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In The

Supreme Court of the United States

October Term, 1992

JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee, and CHARLES W. BURSON, in his capacity as Attorney General of the State of Tennessee,

Petitioners,

v.

BLOOMINGDALE'S BY MAIL LTD.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether actions under 42 U.S.C. § 1983 to challenge state tax assessments, and under 42 U.S.C. § 1988 for attorneys' fees, are maintainable in state courts when plain, speedy, and efficient remedies are available to taxpayers under state statutes in the state courts?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The petitioners urge that a writ of certiorari issue to review the judgment and opinion of the Tennessee Supreme Court entered in the above-entitled proceeding on December 21, 1992. That opinion is reported at 848 S.W.2d 52, and is set forth as Appendix A, App. 1-App. 13, to this Petition.

The unpublished memorandum opinion of the Chancery Court of Davidson County, Tennessee, Part II, was filed on March 8, 1991, and is reprinted as Appendix B, App. 14-App. 19, to this Petition.

The unpublished Order of the Chancery Court of Davidson County, Tennessee, Part II, was entered on March 21,

1991, and is reprinted as Appendix C, App. 20-App. 23, to this Petition.

JURISDICTION

This Petition seeks review of a judgment of the Supreme Court of Tennessee entered on December 21, 1992. A timely petition for rehearing was denied by the Tennessee Supreme Court by order entered on February 22, 1993. (848 S.W.2d 52; Appendix D, App. 24). This Petition is filed within 90 days of that denial of rehearing, pursuant to 28 U.S.C. § 2101(c) and U.S. Supreme Court Rules 13.1 and 13.4.

The jurisdiction of this Court to review the judgment of the Supreme Court of Tennessee by writ of certiorari is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. art. I, § 8, cl. 3:

> The congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . .

U.S. CONST. art. 6, § 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. amend. XIV, § 1, sent. 2:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983, sent. 1:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

TENN. CODE ANN. §§ 67-1-1801 to -1807 (1989 Repl.) are reprinted as Appendix H (App. 39-App. 58).

TENN. CODE ANN. § 67-6-102(4)(J) (1983 Repl.) and § 67-6-102(6)(J) (1989 Repl.) are reprinted as Appendix I (App. 59).

STATEMENT OF THE CASE

Bloomingdale's By Mail Ltd. [hereinafter referred to as "Bloomingdale's"] brought this suit in the Chancery Court of Davidson County, Tennessee to challenge an assessment of sales and use taxes against it by the Tennessee Department of Revenue in the amount of $357,550. This assessment was made pursuant to Tennessee statutes, TENN. CODE ANN. §§ 67-6-102(4)(J) (1983 Repl.) and 67-6-102(6)(J) (1989

Repl.), that imposed on out-of-state direct marketers the duty to collect sales and use taxes on items they sell to Tennessee residents as a result of regular and systematic solicitations in Tennessee through various avenues of interstate commerce. (See Appendix I, App. 59). Bloomingdale's complaint asked the court to set aside the assessment, declare the Tennessee statutes unconstitutional, enjoin enforcement of the statutes and assessment, and award to it attorneys' fees and expenses of litigation pursuant to TENN. CODE ANN. § 67-1-1803(d). Bloomingdale's contended in the trial court that this relief was appropriate because the statutes and assessment infringed its rights guaranteed by the Due Process Clause and Equal Protection Clause (U.S. CONST. amend. XIV, § 1), and by the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3) of the United States Constitution.

The Chancery Court granted summary judgment in favor of the Commissioner of Revenue, finding that Bloomingdale's has sufficient nexus with Tennessee to justify imposition of the State's sales and use tax under the Commerce and Due Process Clauses of the United States Constitution. The Chancery Court ordered that attorneys' fees and expenses of litigation be awarded to the Commissioner of Revenue pursuant to TENN. CODE ANN. § 67-1-1803(d), which authorizes such awards, not to exceed twenty percent (20%) of the amount in dispute. (See Appendix C, App. 21-App. 22).

While the case was pending on direct appeal to the Tennessee Supreme Court, this Court granted certiorari and rendered its decision in *Quill Corporation v. North Dakota*, 504 U.S. ___, 112 S. Ct. 1904 (May 26, 1992). Subsequently, Bloomingdale's (through a Supplemental Brief) and the petitioners (through a Motion to Dispose of Case) agreed that the *Quill* decision was dispositive of the substantive issues in this case, in favor of Bloomingdale's. While the Court in *Quill* agreed that Due Process is not violated by imposition of the sort of tax asserted by Tennessee and accordingly overruled that aspect of its decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), it nevertheless found such a tax violative of the Commerce Clause.

At this juncture, in their Motion to Dispose of Case (see Appendix E, App. 25-App. 27), petitioners agreed that Bloomingdale's should be awarded attorneys' fees and expenses of litigation in an amount equal to twenty percent (20%) of the assessment, as provided for the prevailing party in all state tax cases by Tennessee law, TENN. CODE ANN. § 67-1-1803(d). Bloomingdale's, however, requested an award of the entire amount of attorneys' fees it has expended in the matter, relying on 42 U.S.C. § 1988. (See "Plaintiff-Appellant's Memorandum in Response to Defendants-Appellees' Motion to Dispose of Case," Appendix F, App. 28-App. 32). In reply, petitioners submitted that a fee award pursuant to 42 U.S.C. §§ 1983 and 1988 is not available in tax cases in Tennessee courts, since Tennessee tax procedures, TENN. CODE ANN. §§ 67-1-1801 *et seq.* (known as the "Wilder Bill") provide the exclusive means of challenging a tax assessment in Tennessee, *see* TENN. CODE ANN. § 67-1-1804, and since federal law does not require state courts to maintain suits challenging state taxes pursuant to §§ 1983 and 1988, so long as the state otherwise provides a plain, speedy and efficient remedy whereby taxpayers may raise federal constitutional claims. (See "Reply of Defendants-Appellees to Response of Plaintiff-Appellant to Motion to Dispose of Case," Appendix G, App. 33-App. 38).

In its decision, the Tennessee Supreme Court held that this Court's decision in *Quill* does govern the substantive issues of the case, and further held that Bloomingdale's is entitled to an award of its full attorneys' fees pursuant to § 1988.[1] The Court construed *Howlett v. Rose*, 496 U.S. 356 (1990), to require that state courts afford remedies under §§ 1983 and 1988 whenever a suit is otherwise properly

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[1] On remand from this Court in *Quill*, the Supreme Court of North Dakota has subsequently held that Quill is not entitled to recover its attorneys' fees under § 1988. Its decision thus is directly contrary to that of the Tennessee Supreme Court here. *State v. Quill Corporation*, ___ N.W.2d ___, 1993 WESTLAW 150414 (May 11, 1993) (Appendix J, at App. 60-App. 78). See discussion *infra* at 12, 24-25.

before the state courts, even though *Howlett* involved a county school board rather than state officials and did not involve taxation. (848 S.W.2d at 53-54; Appendix A, at App. 4-App.6). The Court observed that in *Dennis v. Higgins*, 498 U.S. ___, 111 S. Ct. 865 (1991), a § 1983 action for relief from state taxation under the Commerce Clause was maintained in the Nebraska courts. (848 S.W.2d at 54; Appendix A at App. 6). The Tennessee court did not discuss the overriding principles of federal law that defer to state procedures and remedies in matters of state taxation, as derived from the Tax Injunction Act, 28 U.S.C. § 1341, and the fundamental doctrine of federalism as embodied in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). Nor did it deal with the directly conflicting decisions reached by the highest courts of at least five states. Instead, the Tennessee court deemed itself bound by its reading of *Howlett* to award § 1988 attorneys' fees to all plaintiffs who prevail in state court upon federal constitutional grounds. (848 S.W.2d at 56; Appendix A at App. 11-App. 12). It thus held the twenty percent (20%) limit on attorneys' fees provided by Tennessee tax procedure to be superseded in this case. (848 S.W.2d at 56-57; Appendix A, App. 12).

REASONS FOR GRANTING THE WRIT

I.

WHETHER STATE COURTS MUST MAINTAIN STATE TAX CASES UNDER §§ 1983 AND 1988, IN CIRCUMVENTION OF STATE PROCEDURES THAT ARE INTEGRAL TO THE ADMINISTRATION OF STATE TAXATION, IS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Whether the general provisions of 42 U.S.C. §§ 1983 and 1988 apply to the realm of state taxation, and allow taxpayers to circumvent the remedies states have tailored for resolution of tax disputes in the state courts, is an unresolved issue of significant national importance. The power of the states to structure and administer their systems of state and local

taxation is an essential attribute of their sovereignty and is fundamental to their ability to function as independent and effective units within a federal system of government. The Tennessee Supreme Court in the instant case has misread this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990), and has misapplied that decision in holding that state courts must maintain state tax suits under § 1983 and award attorneys' fees under § 1988, even when other carefully-designed state procedures provide for full vindication of all federal claims in the state courts. In reaching its result, the Tennessee court failed to look at the larger body of federal law in this area, including those aspects of the Constitution, acts of Congress, and decisions of this Court which require deference to state remedies and procedures in matters of state taxation, all of which indicate that §§ 1983 and 1988 should not be construed to apply to state tax disputes.

This Court has already expressly recognized the great importance and unresolved status of the issue presented by this Petition. This Court granted certiorari to review precisely this question in *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386, *cert. granted*, 469 U.S. 879 (1984), a case factually and legally on point with the instant one. In that matter the plaintiff taxpayers had prevailed in the South Carolina courts under South Carolina tax procedures on the merits of their claim that the state income tax discriminated against nonresidents. The taxpayers then claimed they had "attained only a hollow victory" because the state courts refused to award them attorneys' fees under § 1988. The Supreme Court of South Carolina held that "[s]tate remedies for asserting rights may not be circumvented by invoking § 1983." That court observed that the sole reason for alleging § 1983 in that tax case was to justify the allowance of attorneys' fees and stated, "We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988." 316 S.E.2d at 389.

Following the granting of certiorari, the *Spencer* case was fully briefed and argued before this Court.[2] The decision of the South Carolina court was subsequently affirmed, albeit by an equally divided vote, since Justice Powell was unavailable to participate in the decision. *Spencer*, 471 U.S. 82 (per curiam), *rehearing denied*, 471 U.S. 1112 (1985). Thus the issue presented was not definitively resolved.

Since that time, the question presented in *Spencer* and here still has not been resolved and has taken on even greater importance. In recent years, taxpayers increasingly have sought to utilize § 1983 to challenge state taxes on federal constitutional grounds. They have been encouraged to do so by the availability of injunctive relief under § 1983, their desire to avoid state refund, administrative, and judicial prerequisites, and the attractive attorneys' fees offered under

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[2] The questions presented in *Spencer*, as framed by the petitioners, were:

> 1. May a state court of general jurisdiction refuse to entertain a plaintiff's 42 U.S.C. § 1983 claim and thereby avoid awarding attorney's fees under 42 U.S.C. § 1988 even though the plaintiff successfully challenges in that court a state statute's validity under the United States Constitution?
>
> 2. May a state court deny attorney's fees under 42 U.S.C. §§ 1983 and 1988 on the ground that Congress did not intend §§ 1983 and 1988 to require an award of attorney's fees where a state law provides a state remedy and prohibits the award of attorney's fees?

U.S. Supreme Court No. 84-249, Petition for a Writ of Certiorari at (I). As framed by the respondent, the question was:

> If a taxpayer asserts a cause of action to recover state income taxes in state court under a plain and adequate state remedy which allows the raising of any and all constitutional objections, may the state court properly decline to hear a cause of action under 42 U.S.C. § 1983 brought in the same suit?

U.S. Supreme Court No. 84-249, Brief in Opposition to Petition for Writ of Certiorari at i.

§ 1988. This Court in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), recognized that while the Tax Injunction Act, 28 U.S.C. § 1341, ordinarily precludes federal courts from entertaining challenges under § 1983 to state taxation, "whether state courts must assume jurisdiction over these cases is not entirely clear." 481 U.S. at 234 and n.7.[3] Indeed, in the *Quill* case itself, the Supreme Court of North Dakota has very recently issued its opinion holding that Quill is not entitled to proceed under § 1983 or to recover its attorneys' fees under § 1988. ___N.W.2d___, 1993 WESTLAW 150414 (N.D. May 11, 1993) (Appendix J, App. 60-App. 78). See discussion at 12, 24-25 *infra*.

The decision of the Tennessee Supreme Court, by ignoring controlling principles of federal law and misapplying the Supremacy Clause, strikes a severe blow at our system of federalism by depriving the states of their traditional and essential role in determining how challenges to their tax laws may be brought. Through a misguided reading of the civil rights laws, the Tennessee court deemed itself bound by federal law to allow taxpayer claims to be asserted under §§ 1983 and 1988. The court adopted this view of federal requirements despite the availability of a carefully-designed state tax procedure that allows taxpayers to adjudicate fully their federal claims, as well as state law issues, while at the same time guaranteeing state fiscal stability. This case affords a timely and appropriate vehicle for this Court definitively to

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[3] In *Arkansas Writers* the state courts had not yet indicated whether they would exercise § 1983 jurisdiction in that case, and this Court reserved the issue for the Arkansas courts to consider on remand. 481 U.S. at 233-34. Subsequently, in *Dennis v. Higgins*, 498 U.S. ___, 111 S. Ct. 865 (1991), Justice Kennedy observed that the holding of that case that the Commerce Clause guarantees judicially-cognizable personal rights, makes the unresolved question of § 1983 jurisdiction over state taxation a matter of "paramount importance, as we risk destruction of state fiscal integrity. . . . " 111 S. Ct. at 880 (Kennedy, J., dissenting).

resolve the question of the applicability of §§ 1983 and 1988 to state tax matters.

Thus the instant question is one of great national importance that has not been, but should be, settled by this Court. U.S. Supreme Court Rule 10.1(c). In resolving this issue, §§ 1983 and 1988 should be placed within the proper context of the whole body of federal law, as expressed by Congress in the Tax Injunction Act, by the framers of the Constitution through the structure of federalism, and by this Court in its many decisions deferring to the states in the design and administration of their systems of taxation.

A.

Sections 1983 and 1988, as General Statutes Protecting Civil Rights, Were Not Intended to Displace State Procedures in Matters of Taxation.

The federal civil rights laws embodied in 42 U.S.C. §§ 1983 and 1988 effectuate important national goals, but they were never designed or intended to displace state administrative and judicial procedures in the realm of state taxation. The legislative history of § 1983, which was originally adopted as one of the Ku Klux Klan Acts after the Civil War, reflects the chief concern of Congress that state remedies for enforcing federal rights under the Fourteenth Amendment were inadequate. *See Monroe v. Pape*, 365 U.S. 167 (1961); *Haring v. Prosise*, 462 U.S. 306 (1983). There is no indication that the statute was aimed at state tax systems at all, particularly where those systems provide for complete vindication of all federal rights. It should be stressed that § 1983 by itself affords no additional rights beyond those guaranteed by the Constitution and substantive federal law; it merely affords a procedural vehicle. Similarly, § 1988 applies only to actions to enforce the provisions of § 1983 and the other enumerated statutes. It does not guarantee any general federal right to attorneys' fees wherever constitutional violations are found, but operates only in tandem with § 1983 and its related statutes. Where § 1983 does not provide a remedy, attorneys' fees are not available under § 1988. *Smith v. Robinson*, 468

U.S. 992 (1984). The very wording of § 1988 makes this conclusion inescapable. Thus the threshold question concerning the attorneys' fee claim in the instant case is whether this action was cognizable under § 1983.

In the context of state taxation, § 1983 must be read in light of other acts of Congress and the fundamental constitutional structure of federalism. This Court repeatedly has recognized that Congress may foreclose a remedy under § 1983 by providing a comprehensive enforcement mechanism for protection of a federal right. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Smith v. Robinson*, 468 U.S. at 1005 n.9. To demonstrate such foreclosure, "the statutory framework must be such that '[a]llowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.' " *Golden State*, 493 U.S. at 107, *quoting Smith*, 468 U.S. at 1012.

Just this sort of congressional foreclosure of a § 1983 remedy exists with respect to state taxation. Neither the language nor history of § 1983 indicates the slightest intention to comprehend state taxation within its scope. Moreover, through the Tax Injunction Act the Congress has provided for deference to state forums and remedies in tax matters, and in decisions such as *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), this Court has indicated that such deference is constitutionally required by the very structure of our federal system.

The decision of the Tennessee Supreme Court ignored these cardinal principles and totally misread the holding in *Howlett v. Rose*. *Howlett* was not a tax case and did not involve state officials. Instead, it dealt with the search of a student's car and his suspension from school by local school officials. Thus none of the special considerations and congressional and constitutional policies that arise in a state tax case were invoked. Moreover, since neither the state nor its officials were involved, none of the concerns of the Eleventh Amendment were present. *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). There was never any doubt or issue that claims under §§ 1983 and 1988 could be brought in *Howlett*

in both federal and state courts. This Court plainly held that in hearing such a case under § 1983, the state courts must afford the full panoply of remedies provided by that statute, just as would a federal court, and could not interpose defenses peculiar to Florida law.

This was recognized by the Supreme Court of North Dakota in its recent decision on remand in *State v. Quill Corporation*, ___N.W.2d___, 1993 WESTLAW 150414 (N.D. May 11, 1993) (Appendix J, App. 60-App. 78). In interpreting *Howlett*, the North Dakota court observed that "the point the Court is making is that the Supremacy Clause precludes state courts from applying state procedural rules that would necessarily produce a different result than if the case had been brought in federal court." 1993 WESTLAW 150414 at *4, Appendix J at App 68. The North Dakota court stressed the congressional goal of "intrastate uniformity," that is, that § 1983 be applied uniformly regardless of whether suit is brought in state or federal court. *See Felder v. Casey*, 487 U.S. 131 (1988); *Wilson v. Garcia*, 471 U.S. 261 (1985). It concluded, "The federal interest in intrastate uniformity does not require recognition of the § 1983 claim in a state court when it would not be recognized in federal court." 1993 WESTLAW 150414 at *5, Appendix J at App. 70. The North Dakota court thus held that actions pursuant to §§ 1983 and 1988 could not be brought in state court with respect to state taxation, observing that such a holding preserves uniformity of results in § 1983 actions, whether brought in state or federal court within North Dakota. *Id.*

The same result should obtain in Tennessee. Obviously, the maintenance of a state tax case under state procedures in state court, in a setting where the federal courts lack jurisdiction to hear the claim at all, is distinguishable from *Howlett*, in which the federal courts clearly could have heard the § 1983 claim. In its decision below, the Tennessee court wrenched *Howlett* from its moorings and applied it in a very different setting, a setting which the Congress, the Constitution, and this Court have deemed to require special procedures and special deference to concerns of state sovereignty and fiscal viability. Although the Tennessee court based its

decision entirely on its interpretation of federal law, it misconstrued its obligation under that law[4] and ignored the whole body of federal law that has, since the foundation of the Republic, given great latitude and deference to the states in matters of taxation.

Howlett does not supply the easy answer to the question presented here, and the Tennessee court erred in thinking so. Rather, defining the scope of §§ 1983 and 1988 in state tax matters requires careful attention to the Tax Injunction Act, federalism, and the constitutional doctrines pronounced by this Court.

B.

State Tax Cases Are Not Maintainable in State Court Under §§ 1983 and 1988 Because of the Tax Injunction Act, So Long as State Procedures Provide a Plain, Speedy, and Efficient Remedy for Adjudication of All Federal Claims.

Congress has long recognized the states' vital interests in keeping state tax cases in state courts under state procedures. The Tax Injunction Act, 28 U.S.C. § 1341, provides that the federal courts

> shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The literal terms of the Act address only the federal courts. Yet, the intent and policies underlying the Act are very instructive in establishing the scope Congress intended for §§ 1983 and 1988 in state tax matters in the state courts as well. Upon examination, it is clear Congress never contemplated that the civil rights statutes should disturb or supersede state remedies in the state courts.

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[4] Ironically, until 1986, the Tennessee Supreme Court refused to allow Tennessee courts to entertain § 1983 actions in any matters whatsoever. *See Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986), *overruling Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969).

The Tax Injunction Act was not a new notion when it was enacted in 1937. Rather, it codified traditional federal practice and had "roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), *quoting Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Thus the Act is more than a jurisdiction-shifting provision that remits state tax cases to state courts; instead, its underlying principles mandate deference to state procedures as well as forums, and operate to preclude § 1983 actions in state courts in state tax cases.

Congress has assigned to the federal courts the "paramount role" in entertaining § 1983 actions. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989). Yet Congress has barred from those courts all claims, including § 1983 claims, seeking injunctive or declaratory relief from state tax laws, so long as adequate remedies are available under state law. *See California v. Grace Brethren Church*, 457 U.S. 393 (1982). It would be incongruous for state courts to entertain actions challenging state taxes under federal statutes, such as §§ 1983 and 1988, when the federal courts themselves, in their "paramount role," lack jurisdiction over such actions because adequate remedies are available under state law.

The design of the Tax Injunction Act is to defer not only to state courts, but also to the remedies, procedures, and requirements imposed by state law. In passing the Act, Congress was concerned with protecting "state procedures which authorize litigation challenging a tax after the tax has been paid." *Rosewell*, 450 U.S. at 522, *quoting Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943). Such state procedures are threatened as much, or more, by a federal procedure (such as § 1983) that is alien to the state fiscal process, as by federal court jurisdiction over such matters. Thus this Court in *Fair Assessment* concluded that taxpayers

> must seek protection of their federal rights *by state remedies*, provided of course that those remedies

> are plain, adequate and complete, and may ultimately seek review of the state decisions in this Court.

454 U.S. at 116 (emphasis added). To allow a § 1983 action and the corresponding provision for attorneys' fees under § 1988 in state court would circumvent the very remedies and procedures given deference by the Tax Injunction Act and would offend the spirit of that Act and the even more fundamental principles upon which it is grounded.[5] It would also discount this Court's fostering of intrastate uniformity among the federal and state courts of each jurisdiction in handling § 1983 claims.

The validity of this reasoning is confirmed by this Court's recent analysis of a similar question involving § 1983 in *Will v. Michigan* and *Hafer v. Melo*, 502 U.S. ___, 112 S. Ct. 358 (1991). *Will* presented the issue of whether § 1983 overrides state sovereign immunity provisions when § 1983 actions are heard in state courts, since in their own courts the states lack the immunity they ordinarily possess in federal court by the force of the Eleventh Amendment. The Court considered the Eleventh Amendment not because it was directly applicable, but because "the fact that Congress did not intend to override state immunity when it enacted § 1983 was relevant to statutory construction . . . . " *Hafer*, 112 S. Ct. at 364. The Court reasoned,

> "Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims," Congress' failure to authorize

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[5] A primary goal of tax procedures, for instance, is to prevent court-issued injunctions from interfering with state tax collections. Both federal (28 U.S.C. § 1341) and state (TENN. CODE ANN. § 67-1-1801(a)(1)(B) and (c)) laws forbid such interference. Yet under Bloomingdale's peculiar exigesis of these statutes, such injunctions could issue from a state court operating under the federal procedure of § 1983. Such a result is the exact opposite of a stated purpose of Congress in passing the Tax Injunction Act. Sen. Rep. No. 1035, 75th Cong. 1st Sess. 2 (1937).

> suits against States in federal courts suggested that it also did not intend to authorize such claims in state courts.

Hafer, 112 S. Ct. at 364, *quoting Will*, 491 U.S. at 66.

By the exact same token, Congress' failure to authorize tax suits against states in federal courts suggests that it also did not intend to authorize tax suits pursuant to § 1983 in state courts. Just as Congress intended the states to be protected by state sovereign immunity in their own courts, so the Tax Injunction Act demonstrates the Congressional intent that state courts follow their own procedures in tax cases, rather than requiring that § 1983 displace those procedures. As the North Dakota court observed in the recent *Quill* decision, a contrary result

> would reopen the "anomaly . . . that a State might be forced to entertain in its own courts suits from which it was immune in federal court," which the *Howlett* Court concluded had been "fully met" by *Will*. *Howlett*, 496 U.S. at 365.

1993 WESTLAW 150414 at *5, Appendix J at App. 70.

The efforts of federal courts to determine the adequacy of state remedies in myriads of cases belie an application of the Tax Injunction Act that would include analysis of possible § 1983 remedies in state courts. This demonstrates that the reference of § 1341 to a remedy in the courts of the state implies deference to state-created remedies, not merely to the state-created forum. Thus the Act is not merely a forum-shifting device, but a remedy-shifting device as well, relegating tax claimants to state courts and state remedies, so long as both those courts and remedies provide for efficient adjudication of federal rights.

Consequently, even though the Tax Injunction Act by its terms speaks only about federal courts, its underlying principles and its necessary and obvious construction are that state tax cases should be heard in state courts pursuant to state remedies, so long as those remedies are "plain, speedy and efficient." Such is clearly the case here, for Bloomingdale's successfully pursued its Commerce Clause claim under Tennessee procedure in the Tennessee courts. The Supremacy

Clause, U.S. CONST. art. 6, § 2, contrary to the decision below, requires no more. There is no evidence that § 1983 was intended to disrupt the state court procedures to which federal courts under § 1341 must defer. To the contrary, the strong indication, under the *Golden State Transit* doctrine, is that by enacting § 1341 Congress has foreclosed a § 1983 remedy in state tax matters.

C.

Sections 1983 and 1988 Do Not Apply to State Tax Cases in State Courts Because Congress Did Not Intend to Infringe the Power of Each State Within Our Federal System to Structure Its Own Fiscal Affairs.

Quite apart from the Tax Injunction Act, and even more fundamentally, the federal system created by the Constitution guarantees each state the power to order its own fiscal structure. In enacting §§ 1983 and 1988, Congress demonstrated no intent to interfere with state autonomy in that regard. So long as all federal rights may be vindicated through the tax procedures ordained by the states, the fundamental doctrine of federalism preserves those procedures inviolate.

This Court has long recognized that maintaining the integrity of state fiscal processes and tax systems is essential to the existence of the states as sovereign entities. *Dows v. Chicago*, 11 Wall. (78 U.S.) 108, 110 (1871). For that reason, this Court found in 1909 that

> an examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the federal rights of the persons could otherwise be preserved unimpaired.

Boise Artesian Water Co. v. Boise City, 213 U.S. 276 (1909). Some of the reasons underlying this historical doctrine were stated by Justice Brennan as follows:

> "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need." . . . *The special reasons justifying the policy*

> *of federal noninterference with state tax collection are obvious.* The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and *taxpayers might escape the ordinary procedural requirements imposed by state law.* During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

Perez v. Ledesma, 401 U.S. 82, 127-28 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (citations omitted) (emphasis added).

For these reasons, a strong showing of congressional intent is required to justify any construction of § 1983 that would impinge on the states' fiscal authority. The rule is well established that when a view of a statute is taken that either significantly changes the federal-state balance or abrogates the state's sovereign immunity, a clear statement of intent is required. *See United States v. Bass*, 404 U.S. 336 (1971); *Quern v. Jordan*, 440 U.S. 332 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). No such showing can be made concerning §§ 1983 and 1988 in this case.

The decision in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), most fully demonstrates the importance of federalism in the state tax arena, for in that case the Tax Injunction Act was not facially dispositive of the taxpayers' claim, since damages were sought rather than the declaratory and injunctive relief expressly prohibited

by the Act. There Missouri property taxpayers had brought suit in federal court under § 1983, rather than under proper Missouri procedures, alleging unequal taxation in violation of the Fourteenth Amendment. Nevertheless, this Court held that principles of federalism and comity bar federal courts from granting relief in state tax cases, despite the otherwise broad scope of § 1983.

The *Fair Assessment* Court relied heavily on the doctrines pronounced in *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943), to the effect that,

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that *such relief should be denied in every case where the asserted federal right may be preserved without it.*

319 U.S. at 298, *quoting Matthews v. Rodgers*, 284 U.S. 521, 525 (1931) (emphasis added). The Court then held that maintenance of the § 1983 action "would be no less disruptive of Missouri's tax system than would the historic equitable efforts to enjoin the collection of taxes, efforts which were early held barred by considerations of comity." 454 U.S. at 113. The Court thus held the § 1983 action barred and said that,

> Such taxpayers must seek protection of their federal rights by *state remedies*, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the decisions in this Court.

454 U.S. at 116 (emphasis added).

By the same token, maintenance of § 1983 actions in state courts in tax cases would be equally disruptive to carefully designed state procedures for administering and challenging state taxes. Such claims could circumvent all the procedural safeguards of state tax administration and wreak

havoc with state fiscal affairs. In fact, imposing wholly different federal procedures would in many ways affect state taxation more drastically than would imposing a federal forum.[6] While *Fair Assessment* speaks in terms of comity, since it deals with the courts of different sovereigns, the underlying doctrine of federalism mandates the same result in dealing with state versus federal remedies in state tax cases.

When generally applicable federal statutes (such as §§ 1983 and 1988) collide with bedrock constitutional doctrines (such as federalism) in an area as essential to state sovereignty as the administration of its tax system, this Court has made clear that federalism, a fundamental principle of our Constitution, must prevail. *Fair Assessment*, 454 U.S. at 105. The Tennessee court erred by finding a Supremacy Clause issue when, in fact, the correct application of federal law – which includes not only §§ 1983 and 1988 but also the Tax Injunction Act and constitutional principles of federalism – requires maintaining the integrity of Tennessee's tax procedures as the wholly adequate and, pursuant to TENN. CODE ANN. § 67-1-1804, exclusive means for challenging state taxes in Tennessee.

D.

The Decision of the Tennessee Supreme Court Misapplies the Civil Rights Laws in an Area of Paramount Importance to State Fiscal and Judicial Integrity and Should Therefore Be Reviewed by This Court.

The decision of the Tennessee Supreme Court has not only misapplied *Howlett*, ignored Congressional intent as embodied in the Tax Injunction Act, and discounted the weighty concerns of federalism; in addition, it has misconstrued §§ 1983 and 1988 so as to impede carefully-tailored

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[6] Indeed, it was not so much the federal forum as the accompanying federal procedures, which could circumvent state anti-injunction and related protections, that motivated passage of the Tax Injunction Act.

state tax systems in ways far removed from the intent of the framers of those acts.

The decision below distorts §§ 1983 and 1988 and interjects them into disputes alien to their intended purposes. These civil rights laws were never designed as vehicles for major national corporations to litigate with state tax administrators about legitimate questions of state jurisdiction and taxing nexus.[7] With respect to § 1988, in particular, a fee award in this setting does nothing to aid the enforcement of rights of poor and unpopular citizens who might otherwise have difficulty in obtaining counsel, which was the focus of Congress in enacting that provision.[8] Indeed, the history of litigation in this and other courts amply demonstrates the ability of major corporations to pursue dormant Commerce Clause litigation without receiving attorneys' fee awards. *Dennis*, 111 S. Ct. at 880 (Kennedy, J., dissenting). The effect of such an overextension of the civil rights laws would be to chill enforcement actions by state revenue officials and retard

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[7] The states' position on the substantive question presented in this litigation was, to a considerable degree, adopted by this Court in *Quill*. The Court overruled the Due Process prong of *Bellas Hess*, implying that Tennessee does indeed have the "minimum contacts" with Bloomingdale's that would satisfy Due Process. *Quill*, 112 S. Ct. at 1911. Notwithstanding its ultimate conclusion that the Commerce Clause prevents state taxation of out-of-state mail-order firms, the Court admitted that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." *Id.* at 1914.

[8] *See* Sen. Rep. No. 94-1011, at 6 (1976). Congress was assured in enacting the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, which became § 1988, that such awards would be "limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate." Sen. Rep. No. 94-1101, at 4, quoted in *Dennis v. Higgins*, 111 S. Ct. at 879-80 (Kennedy, J., dissenting).

the proper refinement of the law in an area that is a "quagmire . . . leav[ing] much room for controversy and confusion and little in the way of precise guides to the states in the exercise of their indispensable power of taxation." *Quill*, 112 S.Ct. at 1915. Such a result would be a major blow to the states, and merits far closer examination than that afforded by the court below.

Believing itself bound by its misreading of the *Howlett* decision, the Tennessee court felt that the means for asserting federal claims against state taxes had already been "nationalized" by this Court. Until now each of the states, including Tennessee, has had a carefully designed system that allows taxpayers to fully adjudicate their federal rights, as well as state law issues, while guaranteeing state fiscal stability. The decision below allows those state procedures to be circumvented easily by the device of pleading a federal claim. It is easy enough to couch most, if not all, state tax claims as alleged violations of Due Process, Equal Protection, the Commerce Clause, or other federal constitutional or statutory rights. As a result, state tax litigation would become hopelessly entangled in general civil rights law, and state treasuries would be impacted seriously. Such a development threatens the disruption of state fiscal affairs by subjecting tax administrators to the sort of injunctions, declarations, damages, and general vexations that the Congress and this Court have long sought to prevent. Moreover, the resulting problems would be beyond the power of state legislatures to address, since they would derive from §§ 1983 and 1988. Thus fundamental state tax policies could be altered only by Congress, producing a completely unintended and unwise infringement of state sovereignty.

To the contrary, the Tennessee court should have concluded that the state's statutory tax procedures, TENN. CODE ANN. §§ 67-1-1801 to -1807 (Appendix H, App. 39-App. 58), provide for the full vindication of all federal rights and are, as they purport to be, the exclusive remedy for challenging Tennessee taxes. TENN. CODE ANN. § 67-1-1804.

There can be no doubt that the Tennessee tax procedures, available to all taxpayers and followed by Bloomingdale's in

this case, provide a plain, speedy, efficient, adequate, and complete remedy for enforcement of all federal claims. *See Independent Baptist Church v. Tennessee*, 468 F. Supp. 71 (E.D. Tenn. 1978) (holding Tennessee's statutory remedies, even under the former and much more stringent "payment under protest" system, adequate). Indeed, these Tennessee tax procedures are among the most liberal in the country in favoring taxpayer rights. They allow litigation without prior payment of a tax assessment, and they provide to a claimant who prevails on any grounds (state or federal) a generous interest rate on refunds, as well as attorneys' fees and expenses of litigation of up to twenty percent (20%) of the disputed amount. The Tennessee procedures provide far more advantageous remedies for taxpayers than the Illinois procedures held to be sufficient in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). There this Court found the Illinois remedies, which did not allow even for interest on tax refunds, were adequate to displace § 1983 jurisdiction in federal court, because they provided the taxpayer with a full hearing and judicial determination at which she could raise any and all constitutional objections to the tax. 450 U.S. at 514. Neither § 1983, the Tax Injunction Act, nor the Supremacy Clause requires more.[9]

Because the question of state court jurisdiction under §§ 1983 and 1988 in tax matters is of such monumental importance to state tax and judicial procedure, as well as to the proper understanding of the federal civil rights laws, and because the decision below is out of line with federal law as embodied in the Constitution, acts of Congress, and decisions of this Court, petitioners submit that review should be granted in this case.

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[9] Since federal law did not require a § 1988 remedy in this matter, any attorneys' fee claim in excess of the 20% allowed by state law should have been rejected, because the Tennessee statutory procedure is the exclusive remedy under Tennessee law, TENN. CODE ANN. § 67-1-1804, and the state court was without authority to award a larger sum.

II.

THE DECISION OF THE TENNESSEE SUPREME COURT IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THE FUNDAMENTAL CONSTITUTIONAL QUESTION PRESENTED AND THEREFORE WARRANTS REVIEW BY THIS COURT.

The decision of the Tennessee Supreme Court, in holding that state courts must afford relief under §§ 1983 and 1988 in state tax cases, despite the availability of other adequate state remedies, is in direct conflict with the majority of state courts of last resort that have considered this issue. While another state court of last resort has reached the same result as the Tennessee court, a majority of state high courts disagree with the Tennessee court. The decisions of these courts, and of lower state courts, display fundamental differences in reconciling the doctrine of federalism and the import of the Tax Injunction Act with the role of the federal civil rights laws. Because the resolution of the question presented is so important, and because the disagreements of the state courts are so fundamental, review by this Court is warranted and sorely needed.

The decision of the Supreme Court of South Carolina in *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386, *cert. granted*, 469 U.S. 879 (1984), *affirmed by an equally divided court*, 471 U.S. 82 (per curiam), *rehearing denied*, 471 U.S. 1112 (1985), as discussed *supra* at 7-8, is directly contrary to the decision of the Tennessee Supreme Court herein. In addition, the highest courts of at least four other states have decided, in direct opposition to the Tennessee Supreme Court, that they are not required to proceed and award attorneys' fees under §§ 1983 and 1988 in state tax cases, if state procedures are adequate to vindicate federal rights. In particular, the recent decision of the Supreme Court of North Dakota on remand from this Court's decision in *Quill* is directly contrary to the Tennessee court's decision and is especially relevant, since the instant case was controlled by the decision on the merits in *Quill* concerning state

taxation of out-of-state mail-order sales. It would be unconscionable for these two cases, so alike on the merits, to produce such divergent results concerning the requirements of federal law as to the availability of § 1988 fees. The principal reasoning of the *Quill* decision in denying fees has already been discussed *supra* at 12; the North Dakota court squarely holds that "a § 1983 action seeking to enjoin the collection of state taxes is not cognizable in state court, and accordingly Quill is not entitled to recover its attorney's fees under § 1988." 1993 WESTLAW 150414 at *1, Appendix J at App. 61. Assuming no petition for rehearing is filed, a petition for certiorari by the taxpayer in *Quill* could be filed in this Court on or before August 9, 1993.

In deciding *Quill*, the North Dakota court reaffirmed its earlier holding in *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), which was directly on point. In *Linderkamp* too the only issue on appeal was a § 1988 attorneys' fees request, since relief had already been granted in favor of the plaintiff's Due Process claim under North Dakota law. The court held that because plaintiffs had an adequate remedy under state law, their § 1983 action was not cognizable in state court and accordingly they were not entitled to attorneys' fees pursuant to § 1988. The *Linderkamp* court stressed that the Tax Injunction Act is based "at least in part upon deference to state remedial schemes," and that a state court § 1983 action would be "no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court." 397 N.W.2d at 80.

Similarly, the Connecticut Supreme Court in *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509, 514 (1985), upheld that state's "exclusive adequate remedial system," and dismissed a § 1988 claim for attorneys' fees in a tax context. There the plaintiffs had brought suit in state court under § 1983, seeking damages, injunctive relief, and attorneys' fees on grounds that a formula for sewer assessments violated Equal Protection and Due Process. The Connecticut court ruled that the sewer assessment amounted to a tax, and turned to consider whether § 1983 challenges to state taxes should be entertained in state court. The court

reasoned from the Tax Injunction Act and the logical implications of federalism that while § 1341 does not directly operate as a jurisdictional barrier in state courts, there was no need to subject state tax collectors to state actions brought under § 1983. 490 A.2d at 513-14.

Along the same lines, the Supreme Court of Georgia, in *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976), and the Supreme Court of Missouri, in *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (en banc), have held that no state tax actions may be maintained under § 1983 in the courts of those states, since state procedures provide adequate and complete remedies for taxpayer grievances. *Backus*, 224 S.W.2d at 374; *Stufflebaum*, 691 S.W.2d at 272.[10]

All of these decisions of state courts of last resort are in conflict with the holding of the Tennessee Supreme Court that attorneys' fees must be awarded under §§ 1983 and 1988 even though state procedures provide an adequate remedy for vindication of federal rights. None of them support the Tennessee court's premise that a state remedy must in addition permit a fee award under § 1988, or that § 1988 establishes a substantive federal right to attorneys' fees whenever a violation of

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[10] In addition, the Tennessee decision is in conflict with a number of decisions of the state intermediate appellate courts. These include *Vann v. DeKalb County Board of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 43 (1988) (§ 1983 claim in tax case not viable if state remedy adequate); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984) (§ 1983 claim improper since state provided plain, adequate, and complete remedy); and *Greenwich Township v. Murtagh*, 601 A.2d 1352 (Pa. Commw. 1992) (§ 1983 claim improper in tax case since state remedy adequate). *See also Raschke v. Blancher*, 96 Ill. Dec. 711, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Tampam, Inc. v. Property Tax Appeal Board*, 153 Ill. Dec. 55, 208 Ill. App. 3d 127, 566 N.E.2d 905 (1991); *Boughton Trucking & Materials, Inc. v. County of Will*, 171 Ill. Dec. 299, 229 Ill. App. 3d 576, 593 N.E.2d 1119 (1992) (all holding Illinois administrative and judicial remedies must be followed).

federal law is found pursuant to state procedure, apart from a § 1983 action.[11]

In contrast, the highest court of only one state, Mississippi, has clearly confronted the question presented and agreed with the Tennessee court that state courts must entertain state tax cases under §§ 1983 and 1988, even despite adequate state remedies. Interestingly, both the Tennessee and Mississippi courts appeared to have squarely adopted the opposite view when first confronted with the question. *See State Tax Commission v. Fondren*, 387 So. 2d 712 (Miss. 1980), *cert. denied sub nom. Redd v. Lambert*, 450 U.S. 1040 (1981), *overruled, Marx v. Truck Renting & Leasing Association, Inc.*, 520 So. 2d 1333 (Miss. 1988), and *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848, 864 (Miss. 1988); *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991) (distinguished in decision below, 848 S.W.2d at 56; Appendix A at App. 10-App. 11).[12] The Mississippi court in *Marx*, however, misread the *Fair Assessment* decision as

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[11] The Tennessee decision also is fundamentally at odds with the decisions of the Supreme Court of Oregon in *Nutbrown v. Munn*, 311 Ore. 328, 811 P.2d 131 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992); the Supreme Court of Wisconsin in *Hogan v. Musolf*, 163 Wisc. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992), and the Supreme Court of Kansas in *Dean v. State*, 250 Kan. 417, 826 P.2d 1372 (1992), all of which hold that a state may require exhaustion of state administrative remedies before any relief under § 1983 need be afforded.

[12] On the other hand, the Kansas Supreme Court, which earlier appeared to award § 1988 fees in tax matters, *Allison v. Board of County Commissioners*, 241 Kan. 266, 737 P.2d 6 (1987), now appears not to. *Dean v. State*, 250 Kan. 417, 826 P.2d 1372 (1992).

indicating that state courts should entertain § 1983 actions in state tax cases.[13]

The Supreme Court of Arkansas, in *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987), on remand from this Court's decision, held that it would award attorneys' fees under § 1988 in that state tax case. The Court did not make clear, however, whether it deemed itself obliged by federal law to do so. Similarly, the Supreme Judicial Courts of Maine and Massachusetts, in *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991), and *Porter v. Treasurer*, 385 Mass. 335, 431 N.E.2d 934 (1982), awarded § 1988 attorneys' fees without thorough discussion of the instant issue.[14]

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[13] The Court in *Fair Assessment* noted in passing that Missouri courts did entertain § 1983 actions, but the Court certainly did not hold that state courts must entertain tax cases under § 1983. 454 U.S. at 116. Of course, the Missouri Supreme Court has now clearly held in *Stufflebaum v. Panethiere* that the courts of that state will *not* entertain tax cases under § 1983. 691 S.W.2d at 272.

[14] Several lower state courts also have maintained § 1983 jurisdiction in tax cases. Upon close examination, however, none of these cases clearly hold that state courts are required by federal law to maintain §§ 1983 and 1988 claims in tax cases in the face of an exclusive and adequate remedy provided by state law. These decisions include *Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue*, 583 N.E.2d 214 (Ind. Tax Ct. 1991) (decision based on holding that Indiana tax procedure did not purport to provide an exclusive remedy, 583 N.E.2d at 225, 227); *Bung's Bar & Grille, Inc. v. Township Council*, 206 N.J. Super. 432, 502 A.2d 1198 (1985) (court recognized a state may choose not to exercise § 1983 jurisdiction in tax cases, 502 A.2d at 1214); *Beverly Bank v. Board of Review*, 72 Ill. Dec. 791, 117 Ill. App. 3d 656, 453 N.W.2d 96 (1983) (Supremacy Clause issue not discussed from state tax perspective); *Satellink of Chicago, Inc. v. City of Chicago*, 119 Ill. Dec. 545, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988) (same); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1986) (same).

Some courts have noted that in *Dennis*, 111 S. Ct. 865, a case which arose from Nebraska state court, this Court held that a Commerce Clause claim could be brought under § 1983. The issue in that case, of course, was whether the Commerce Clause creates personal rights that are judicially cognizable in any forum. The issue of whether state courts must allow for adjudication of federal rights in tax cases under § 1983 was not raised or addressed by the Court. Clearly *Dennis* does not purport to resolve this jurisdictional question, which the Court expressly reserved in *Arkansas Writers Project* and which is directly presented by this Petition. *See Quill*, 1993 WESTLAW 150414 at *8, Appendix J at App. 77.

The decision below of the Tennessee Supreme Court is in direct conflict with decisions of at least five other state courts of last resort. In addition, the state courts generally, including appellate courts at the intermediate and highest levels, display considerable confusion concerning the fundamental constitutional question presented. Further litigation in the state courts is unlikely to shed additional light on the topic, concerning which such diametrically opposing positions have taken root. Such confusion and conflict among the state courts increasingly contributes to judicial inefficiency and a very troubling lack of uniformity in the construction of §§ 1983 and 1988. The proper application of these statutes, in light of the whole body of federal constitutional and statutory law, can only be clarified by this Court. Thus review by this Court is warranted, pursuant to Rule 10.1(b) of the Court.

CONCLUSION

For the reasons set forth above, the petitioners request that this petition be granted and that a writ of certiorari issue to review the decision of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX A*

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

BLOOMINGDALE'S BY MAIL LTD., Plaintiff/Appellant, v. JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee and CHARLES W. BURSON in his capacity as Attorney General of the State of Tennessee, Defendants/Appellees.	FOR PUBLICATION Filed December 21, 1992 DAVIDSON CHANCERY Hon. C. Allen High, Chancellor (Part II). S/C No. 01S01-9106-CH-00047

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

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OPINION

(Filed Dec. 21, 1992)

REVERSED AND REMANDED. PER CURIAM

The parties have agreed that the disposition of this case is controlled by the United States Supreme Court's decision in *Quill Corp. v. North Dakota, 504* U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Therefore the decision of the Chancery Court granting summary judgment in favor of the Defendants is vacated. The revised assessment is set aside in its entirety. The Plaintiff is not obligated to collect or remit Tennessee use tax.

The parties do not, however, agree concerning what law governs the award of attorneys' fees. For reasons hereinafter set forth, we hold that the upper limit on attorneys' fees set forth in T.C.A. § 67-1-1803(d) is not controlling in this case. We remand the case to the trial court for a determination of the amount of attorneys' fees to be awarded to the Plaintiff-Appellant in accordance with the following rules.

I.

The Defendants-Appellees contend that the award of attorneys' fees is governed by T.C.A. § 67-1-1803(d), which provides as follows:

> The court shall award to the prevailing party reasonable attorneys' fees and expenses of litigation up to twenty percent (20%) of the amount assessed or denied, including interest after payment.

The Appellant, on the other hand, asserts that, since *Quill Corp. v. North Dakota, supra,* was decided on the basis of a violation of a taxpayer's rights under the United States Constitution, the award of attorneys' fees is controlled by 42 U.S.C. § 1988. This federal statute provides, in pertinent part, as follows:

> In any action or proceeding to enforce a provision of (42 U.S.C. § 1983), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Quill Corp. v. North Dakota, supra,* the U.S. Supreme Court determined that a statute similar to the Tennessee statute involved in this case (T.C.A. § 67-6-102(6)(J)) was unconstitutional because it violated the Commerce Clause of the United States Constitution. The U.S. Supreme Court agreed with the Supreme Court of North Dakota that the statute did not violate the Due Process Clause of the U.S. Constitution. The U.S. Supreme Court stated as follows:

> Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are

> animated by different constitutional concerns and policies.
>
> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connection with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. . . . Accordingly, contrary to the State's suggestion, a corporation may have the "minimum contacts" with a taxing state as required by the Due Process Clause, and yet lack the "substantial nexus" with that State as required by the Commerce Clause. 112 S.Ct. 1904, at 1913, 1914.

The U.S. Supreme Court, in *Quill Corporation v. North Dakota, supra,* determined that the North Dakota statute violated the "substantial nexus" requirement of the Commerce Clause of the U.S. Constitution because the statute purported to subject to taxation business entities that maintained no property or personnel in the State of North Dakota.

In *Howlett v. Rose,* 110 S.Ct. 2430, 110 L.Ed.2d 332, (1990), the plaintiff was proceeding in a state court to enforce his federal constitutional rights pursuant to 42 U.S.C. § 1983. The issue before the U.S. Supreme Court was stated by the Court as follows:

> The question in this case is whether a state law defense "sovereign immunity" is subject to a school board *otherwise subject to suit in Florida court* even though such a defense would not be available if the action had been brought in a federal forum. (Emphasis added.) 110 S.Ct. 2430, at 2433.

The U.S. Supreme Court, in *Howlett v. Rose*, answered the foregoing question in the negative, stating as follows:

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse" . . . The existence of the jurisdiction creates an implication of duty to exercise it. . . .
>
> An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. 110 S.Ct. 2430, at 2439, 2440.

In dicta that makes it clear that the U.S. Supreme Court's decision in *Howlett v. Rose* is not inconsistent with the Tennessee Supreme Court's decision in *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), the U.S. Supreme Court stated as follows:

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes

> the state courts as it finds them." 110 S.Ct. 2430, at 2441.

The statute relied on by the plaintiff in *Howell v. Rose*, 42 U.S.C. § 1983, provides part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), a taxpayer sought relief in a state court pursuant to 42 U.S.C. § 1983. The taxpayer contended that certain retaliatory taxes and fees imposed by the State of Nebraska on carriers and vehicles such as his, which were registered in other states but operated in Nebraska, constituted a burden that violated his rights under the Commerce Clause of the U.S. Constitution. The U.S. Supreme Court summarized the question presented and its response as follows:

> This case presents the question of whether suits for violation of the Commerce Clause may be brought under 93 Stat. 1284, as amended, 42 U.S.C. § 1983. We hold that they may. 111 S.Ct. 865, at 867.

The Court in *Dennis v. Higgins*, further stated as follows:

> Petitioner contends that the Commerce Clause confers "rights, privileges, or immunities"

> within the meaning of § 1983. We agree. 111 S.Ct. 865, at 870.

In *Rogers v. Saylor*, 760 P.2d 232 (Or. 1988), the issue before the Supreme Court of Oregon was as follows:

> This case presents the question whether the limitations on individual or governmental liability contained in the Oregon Tort Claims Act . . . apply to an action which states a claim under the federal civil rights act, 42 U.S.C. § 1983, when that claim is brought in state court. 760 P.2d 232, at 234.

The Supreme Court of Oregon concluded that the limitations in the Oregon Claims Tort Act did not apply, stating as follows:

> Whether characterized as a part of the traditional limitation which holds that the courts of one state cannot alter the substantive rights afforded by another jurisdiction even when an action is brought outside that jurisdiction, or, as we here recognize, that the United States Constitution prohibits limitations of federal rights in a state court, the result is the same: Neither the Oregon legislature nor the Oregon courts can limit the rights a plaintiff has in a federal claim, even when that federal claim is brought in state court. 760 P.2d 232, at 242.

In *Spain v. Mountanos*, 690 F.2d 742 (9th Cir. 1992), the Court of Appeals for the 9th Circuit concluded that state officials could not rely on state law to deny or limit an award of attorneys' fees under 42 U.S.C. § 1988. The Court of Appeals for the 9th Circuit stated as follows:

> As the district court recognized, appellees are entitled to attorneys' fees as the prevailing parties under 42 U.S.C. § 1988. In *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the Supreme Court held that the Eleventh Amendment does not bar an attorneys fee award against a state under that statute. In particular, the Court concluded that in enacting section 1988, Congress intended to invoke its enforcement power under Section 5 of the Fourteenth Amendment to remove the states' protection under the Eleventh Amendment. 690 F.2d 742, at 744.

The Ninth Circuit Court of Appeals further stated:

> We agree with the Fifth Circuit that a state cannot frustrate the intent of § 1988 by setting up state law barriers to block enforcement of an attorneys' fees award. 690 F.2d 742, at 746.

In *American United for Separation of Church and State v. School District of the City of Grand Rapids*, 835 F.2d 627 (6th Cir. 1987), the plaintiffs had prevailed in asserting their rights under the 14th Amendment to the U.S. Constitution and were awarded declaratory and injunctive relief against a school district. The plaintiffs sought an award of attorneys' fees under 42 U.S.C. § 1988, even though they had not specifically mentioned 42 U.S.C. § 1983 or § 1988 in their complaint. The Court of Appeals for the 6th Circuit concluded that attorneys' fees should be awarded under § 1988. The Court then stated:

> The rule to be distilled from these decisions is that § 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented. The mere failure to plead or argue reliance on § 1983 is not fatal to a claim

> for attorneys' fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to the plaintiffs' ultimate success. 835 F.2d 627, at 631.

The Court further stated:

> The Supreme Court has stated that only two allegations are required to state a cause of action under § 1983: (1) a plaintiff must allege that some person has deprived him of a federal right; and (2) he must allege that the person so depriving him acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). 835 F.2d 627, at 632.

The Court concluded as follows:

> In summary, we conclude that the plaintiffs satisfied the requirements of § 1988 in that they prevailed in action to enforce a provision of § 1983 – redress against persons acting under color of state law whose actions deprived the plaintiffs of "rights, privileges, or immunities secured by the Constitution." As the Supreme Court noted in *Maher v. Gagney* [440 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)], this conclusion is supported by the legislative history of § 1988 which "makes it perfectly clear that the Act was intended to apply to any action for which § 1983 provides a remedy." 448 U.S. at 129 note 11, 100 S.Ct. at 2574 note 11. (citation omitted). This was such an action. 835 F.2d 627, at 633 and 634.

In *L.K. v. Gregg*, 425 N.W.2d 813 (Minn. 1988), the issue before the Supreme Court of Minnesota was as follows:

> The threshold question before the Court then is whether the veterans' suit was brought "to enforce a provision" of § 1983 when the statute was not specifically relied on or cited in the pleadings. If the allegations cannot support an action under § 1983, attorney fees are not available and the remaining questions need not be reached. 425 N.W.2d 813, at 817, 818.

The Supreme Court of Minnesota concluded that attorneys' fees should be awarded under 42 U.S.C. § 1988. The Court stated:

> We believe the better practice would be for the Court to look at the *substance,* rather than the form, of the underlying action in making its determination of whether the claim is cognizable under section 1983. (Emphasis in original.) 425 N.W.2d 813, at 818.

The Court concluded by stating:

> In summary, when the pleadings are considered as a whole, the veterans, while not specifically citing to section 1983, appear to have met the minimum requirements for establishing a claim for relief thereunder as enunciated by the United States Supreme Court. 425 N.W.2d 813, at 820.

The Appellees in this case rely on this Court's decision in *L.L. Bean, Inc. v. Bracey,* 817 S.W.2d 292 (Tenn. 1991). However, the Court's decision in that case supports the Appellant, not the Appellees. The issue in *L.L. Bean* was whether a chancery court had subject matter jurisdiction regarding a claim brought under 42 U.S.C. § 1983. The taxpayer in that case had not received an assessment, nor had it paid any taxes that it contested.

This Court concluded that the chancery court should not assume jurisdiction of the case. We stated as follows:

> As did the high courts of North Dakota and Connecticut, we decline to recognize § 1983 jurisdiction in state court over a matter that would not be cognizable in federal court on the basis of § 1983. To do otherwise would undermine the exclusive authority provided in T.C.A. § 67-1-1804 for determining liability with respect to taxes collected or administered by the Department of Revenue. 817 S.W.2d 292, at 297.

Unlike the taxpayer in *L. L. Bean,* Bloomingdale's By Mail, Ltd. had received an assessment and was properly before the chancery court pursuant to the provisions of T.C.A. §§ 67-1-1801 *et. seq.* The holding of the Supreme Court in *L.L. Bean* supports Bloomingdale's By Mail, Ltd. in this case. That holding was stated as follows:

> We hold that the exclusive remedy afforded by T.C.A. §§ 67-1-1801 *et. seq.* is adequate for purposes of determining any liability L. L. Bean may have for Tennessee sales taxes. *In a proceeding brought pursuant to such statutory provisions, L. L. Bean can raise its constitutional objections to the application to it of T.C.A. §§ 67-6-102(6)(J).* (Emphasis added.) 817 S.W.2d 292, at 297.

II.

Pursuant to the foregoing authority, a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights. These Federal rights include rights under the Commerce Clause of the U.S. Constitution. If the party enforcing such rights is successful, that party is entitled to receive an award of attorneys'

fees under 42 U.S.C. § 1988, even though that party did not specifically plead or rely on 42 U.S.C. § 1983 in prosecuting its claim.

The provision that governs the award of attorneys' fees in this case is 42 U.S.C. § 1988. Under that provision, "the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fees as part of the costs." Even though the Federal statute provides that a court had discretion in awarding attorneys' fees under 42 U.S.C. § 1988, the cases interpreting that statute state that the prevailing party should receive an award, unless there are "special circumstances" that would render an award unjust. *Blanchard v. Bergeron,* 109 S.Ct. 939 (1989); *Monroe v. County Board of Education,* 583 F.2d 263 (6th Cir., 1978).

To the extent that T.C.A. § 67-1-1803(d) does not conflict with 42 U.S.C. § 1988, the Tennessee statute's provisions should be applicable. Thus, under the state statute, the plaintiff is entitled to an award of reasonable attorneys' fees up to 20% of the amount assessed. If its (reasonable) attorneys' fees are in excess of that amount, then the court should award the full amount of the attorney's fees (unless there are "special circumstances" not present in this case, that would render such an award unjust). The court may *not* rely on the Tennessee statute to limit the amount of attorneys' fees that would otherwise be awarded under the Federal statute.

III.

CONCLUSION

T.C.A. § 67-6-102(6)(J) is declared null and void because it is in violation of the Commerce Clause of the United States Constitution. Plaintiff-Appellant's Commerce Clause rights were violated by the Commissioner of Revenue's unconstitutional imposition of a duty on the Plaintiff to register as a dealer in Tennessee and collect use tax on its mail order sales.

This case is remanded to the Chancery Court with the following directives: (1) The judgment of the Chancery Court is reversed and vacated. The Chancery Court shall issue judgment in favor of the Plaintiff-Appellant in which it declares that the assessment of taxes against the Appellant is invalid and that the Appellant shall not be required to collect or remit Tennessee use taxes. (2) The Chancery Court shall make a determination of the amount of attorneys' fees and expenses of litigation to which the Appellant is entitled, such determination to be made in a manner consistent with the foregoing opinion of this Court. All court costs, including those on appeal, are adjudged against the Defendants.

PER CURIAM

APPENDIX B

BLOOMINGDALE'S BY MAIL, LTD.	)	IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
VS. NO. 89-3017-II	)	
JOE B. HUDDLESTON, COMMISSIONER	)	TWENTIETH JUDICIAL DISTRICT
	)	DAVIDSON COUNTY, PART II

MEMORANDUM

(Filed Mar. 8, 1991)

This is an action for declaratory judgment and injunctive relief against the State's attempt to impose and enforce liability and use tax collection obligations on the plaintiff under the Tennessee statutes covering out-of-state mail-order companies.

Plaintiff claims it has no place of business, no property, and no employees in Tennessee, and therefore, no actual nexus or connection with the State. Plaintiff argues that the burden of collection unconstitutionally imposes a restraint upon interstate commerce and violates due process.

In particular, plaintiff relies on the decision in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967).

In determining whether a state tax complies with constitutional due process requirements, the controlling question is "whether the state has given anything for which it can ask return." *Bellas Hess*, 386 U.S. at 756. With regard to restraint on interstate commerce, the United States Supreme Court held that "state taxation falling on

interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Id.* Accordingly, when examining the constitutionality of imposing the duty of collection of the use tax upon an out-of-state seller, the relevant legal inquiry is whether there exists "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The existence of such a link or nexus will thus turn upon the individual facts of each case. *L.L.Bean, Inc. v. Pennsylvania Department of Revenue,* 516 A. 2d 820 (1986).

Plaintiff has moved for summary judgment on the basis there are no issues of disputed fact. The summary judgment motion was heard on a stipulation and upon affidavits and depositions in support of and in opposition to the motion. Plaintiff has objected to affidavits filed by the defendant. The Court will first make a ruling on the objections.

The affidavit of Holly Ulrich, a professor of economics, as to changes in the mail order industry was objected to as irrelevant and hearsay. The affidavit presents the witness as a qualified expert in the field of economics. Attached to the affidavit is an unpublished paper entitled "Changes in the Mail Order Industry Since 1967." The affiant, as author of that paper, sets forth opinions and conclusions based on sources usually relied upon by expert in the field of economics.

This evidence is admissible under T.R.E. 702 and 703 and does have some relevance to this controversy.

The affidavit of Matthew N. Murray, a professor of economics, is objected to on the grounds of relevance and

hearsay. Murray has also been qualified as an expert in economics and the evidence is also admissible under T.R.E. 702 and 703. The economic effect that plaintiff and other mail order companies have on Tennessee has relevance to this case.

The affidavit of L. Eldridge concerning the weight of catalogs sent by plaintiff through the mail into Tennessee is objected to as irrelevant. This evidence is relevant to show the approximate amount of garbage the plaintiff regularly sends to Tennessee and the local government must dispose of.

The affidavit of Ray Westphal concerning modern computer use in computing taxes is objected to as irrelevant. One of the issues is the burden imposed on plaintiff in collecting taxes. The objection is overruled.

The part of the affidavit of Evelyn T. Gander that submits advertisements of Bloomingdale's, Inc., a separate corporation not a party in this case, is irrelevant and the objection is sustained.

The affidavit of May E. Bennett submitting defendants catalogs she received in Tennessee appears to have some relevancy and the objection is overruled.

Plaintiff objects to the affidavit of Charles L. Lewis as irrelevant. Plaintiff has admitted that it is within the precise scope of the mail order tax statute, T.C.A. §67-6-102(6)(J); therefore, Mr. Lewis' affidavit is inadmissible.

Plaintiff also objects to portions of the deposition of Robert Vanmeter, plaintiff's chief financial officer, as set

forth in the motion. The relevancy objections are overruled.

The State claims the mail order business today is vastly different from that in 1967, therefore providing nexus in this case that did not exist in *Bellas Hess*.

In the 1960's, the mail order business amounted to approximately $2.4 billion per year. By 1989 it increased to an estimated $183 billion.

Plaintiff solicits sales from Tennessee residents by the distribution of catalogs on a regular and systematic basis. Annually plaintiff distributes at least 25 different types of catalogs. From January to June of 1989, plaintiff distributed approximately 350,000 catalogs to Tennessee residents. The catalogs provide the customer a toll free number for placing orders or asking questions. Plaintiff accepts orders by mail order forms with payment by check, money order or credit card. Placing orders by telephone is the most frequently used method with payment by credit card.

At the time of the *Bellas Hess* decision, the necessity of a national company complying with combined local and state tax rates in several jurisdictions might have imposed a significant burden on interstate commerce. Those concerns have disappeared because of the capability of modern computers. In addition, Tennessee provides a dealer with the option of paying a uniform local rate. Therefore, the dealer selling to Tennessee residents need be concerned with only one tax rate for all of Tennessee.

The 350,000 catalogs shipped to Tennessee during six months from January to June of 1989 were printed on slick, non-recyclable paper. This requires local government to take on the burden of placing this garbage in landfills.

Plaintiff's sales catalog states that the merchandise ordered may be returned for replacement, credit or refund. This amounts to a "sale on approval" in which the goods remain the property of the seller until accepted by the buyer. Under this arrangement, title and risk of loss remains with the plaintiff until acceptance. Thus, plaintiff has a considerable amount of property in Tennessee that requires local governments' protection from fire and theft.

If the *Bellas Hess* decision relied on the principle that exclusively interstate commerce is immune from state taxation, that principle was rejected in *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 326 (1977).

In that case, the Supreme Court held that interstate commerce is required to pay its fair share of state taxes. The Court held a state sales tax on interstate commerce is valid if it satisfies a four prong test. The statutes in question satisfy that test.

It is not necessary to show the taxpayer has a "physical presence" in the taxing state in order to satisfy due process. In more recent years, the nexus test has been whether there is a minimal connection between the interstate activity and the taxing state. *See National Geographic v. California Equalization Board,* 430 U.S. 551, 97 S.Ct. 1386,

51 L.Ed 631 (1977). The essence of the due process clause is to insure fundamental fairness.

In the case of out-of-state retailers enjoying large volumes of sales from the Tennessee marketplace, it is only fair and just for those retailers to collect taxes comparable to those collected by their local competitors.

The Court has, therefore, concluded that T.C.A. §67-6-102(4)(J) and §67-6-102(6)(J) are constitutional, and the State is entitled to a summary judgment.

General Lewis should prepare an order in accordance with this Memorandum.

/s/ C. Allen High
C. ALLEN HIGH,
CHANCELLOR

March 8, 1991

cc: Charles L. Lewis
Joe C. Peel
Maryann B. Gall
Joseph W. Gibbs

APPENDIX C

IN THE CHANCERY COURT FOR
THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY
PART II

BLOOMINGDALE'S BY MAIL, LTD., Plaintiff, v. JOE B. HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee, Defendants.	No. 89-3017-II FO Order Filed and Entered Mar. 21, 1991 Minute Book 164 Page 287

FINAL ORDER

This case was heard on January 18, 1991, before the Honorable C. Allen High, Chancellor, Davidson County Chancery Court, Part II, upon motion for summary judgment filed by the plaintiff. Upon consideration of the complaint, answer, affidavits submitted by both parties, the deposition of Robert F. Van Meter, responses to interrogatories and requests for production of documents, oral argument of counsel, pre- and post-hearing briefs submitted by both parties, and the entire records in this cause,

the Court on March 8, 1991 issued its Memorandum decision, which is incorporated herein by reference.

The Court finds that the plaintiff's objections to the affidavits of Dr. Holley H. Ulbrich, Dr. Matthew N. Murray, Ray Westphal, Ed Eldridge, Nancy E. Bennett, and portions of the deposition of Robert F. Van Meter, as submitted by defendants, are without merit and are overruled. The Court sustains the plaintiff's objection to the portion of the Affidavit of Evalyn T. Gander that submits advertisements of Bloomingdale's, Inc., finding them to be irrelevant. The Court sustains the plaintiff's objection to the Affidavit of Charles L. Lewis, finding it inadmissible in light of plaintiff's admission that plaintiff is within the precise scope of the mail order tax statute.

In accordance with its Memorandum decision, the Court holds that the Tennessee statutes at issue, T.C.A. § 67-6-102(4)(J) (1983 Repl.) and T.C.A. § 67-6-102(6)(J) (1989 Repl.) are constitutional. The Court finds that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

It is therefore ORDERED, ADJUDGED, and DECREED that the plaintiff's motion for summary judgment is denied, and summary judgment is hereby entered in favor of defendants, declaring that the Tennessee mail-order taxing statutes are constitutional and valid. Judgment is hereby entered in favor of the Commissioner of Revenue in the amount of the adjusted assessment, $357,550, plus interest in accordance with T.C.A. § 67-1-801, and attorneys' fees and expenses in accordance with T.C.A. § 67-1-1803(d).

Defendant shall submit an application for attorneys' fees and expenses of litigation, pursuant to the provisions of T.C.A. § 67-1-1803(d), within sixty (60) days of the entry of this Order, unless a Notice of Appeal is filed within thirty (30) days of the entry of this Order in accordance with T.R.A.P. 3 and 4. If this Order is appealed, the prevailing party on appeal shall file such an application within sixty (60) days of the entry of a final order resolving any appeal. Any objections to the application must be filed within twenty (20) days of the date on which the application is filed. A hearing shall be set on the application no sooner than thirty (30) days after the date on which the application is filed.

Costs of this cause are taxed against the plaintiff.

It is so ORDERED.

/s/ C. Allen High
C. ALLEN HIGH
Chancellor

APPROVED FOR ENTRY:

/s/ Charles L. Lewis
CHARLES L. LEWIS (4693)
Deputy Attorney General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order has been hand-delivered to Joseph W. Gibbs and Patricia Head Moskal, BOULT, CUMMINGS, CONNERS & BERRY, 222 Third Avenue North, Nashville, Tennessee 37219, and that a true and exact copy of the

foregoing Order has also been forwarded by U.S. Mail, postage prepaid, to Maryann B. Gall, JONES, DAY, REAVIS & POGUE, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, on this the 13th day of March, 1991.

/s/ Charles L. Lewis
CHARLES L. LEWIS (4693)
Deputy Attorney General

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

BLOOMINGDALE'S BY MAIL LTD., Plaintiff/Appellant, v. JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee and CHARLES W. BURSON in his capacity as Attorney General of the State of Tennessee, Defendants/Appellees.	FOR PUBLICATION Filed February 22, 1993 DAVIDSON CHANCERY Hon. C. Allen High, Chancellor (Part II). S/C No. 01S01-9106-Ch-00047

ORDER ON PETITION TO REHEAR

(Filed Feb. 22, 1993)

Defendants-Appellees Joe Huddleston, Commissioner of Revenue, and Charles W. Burson, Attorney General of Tennessee have filed a Petition to Rehear in the above styled case. After careful consideration, the Court is of the opinion that the Petition to Rehear is not well taken and the same is denied at the cost of Defendants-Appellees.

PER CURIAM

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE
MIDDLE GRAND DIVISION
AT NASHVILLE

BLOOMINGDALE'S BY MAIL LTD.,	)	
Plaintiff-Appellant,	)	
v.	)	Davidson Equity No.
JOE HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee,	)	01-S-01-9106-CH-00047
Defendants-Appellees.	)	

MOTION TO DISPOSE OF CASE

(Filed July 17, 1992)

The Defendants hereby inform the Court that the Defendants agree that this case is controlled by the decision of the United States Supreme Court in *Quill Corporation v. North Dakota*, ___ U.S. ___, 60 U.S.L.W. 4423 (May 26, 1992). In the interest of judicial economy and expeditious disposition of this case, the Defendants submit that the decision of the Chancery Court granting summary judgment in favor of the Defendants should be vacated, and that judgment should be entered in favor of the Plaintiff as follows:

(a) Setting aside the revised assessment in its entirety;

(b) Declaring that Plaintiff is not obligated to register with the Department of Revenue, and is not obligated to collect or remit Tennessee use tax;

(c) Declaring that to the extent that T.C.A. § 67-6-102(6)(J) (Supp. 1991) asserts taxing nexus with companies not having a substantial physical presence in Tennessee, that subsection is in violation of the Commerce Clause;

(d) Awarding Plaintiff attorneys' fees and expenses of litigation, pursuant to T.C.A. § 67-1-1803(d), in an amount equal to twenty per cent (20%) of the amount assessed; and

(e) Adjudging all court costs against the Defendants.

Wherefore, the Defendants respectfully move the Court to enter an Order, consistent with T.R.A.P. 36(a), disposing of this case as described above.

Respectfully submitted,

CHARLES W. BURSON
Attorney General and Reporter

/s/ John Knox Walkup
JOHN KNOX WALKUP
(NO. 7776)
Solicitor General

/s/ Charles L. Lewis
CHARLES L. LEWIS
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Counsel for Defendants-Appellees
JOE HUDDLESTON,
Commissioner of Revenue, and
CHARLES W. BURSON, Attorney
General of Tennessee

[Certificate of Service omitted]

APPENDIX F

IN THE SUPREME COURT OF TENNESSEE
MIDDLE GRAND DIVISION
AT NASHVILLE

BLOOMINGDALE'S BY MAIL LTD., Plaintiff/Appellant, v. JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee, and CHARLES W. BURSON, in his capacity as Attorney General of the State of Tennessee, Defendants/Appellees.	Davidson Equity No. 01-S-01-9106-CH-00047

PLAINTIFF-APPELLANT'S MEMORANDUM IN RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO DISPOSE OF CASE

(Filed July 22, 1992)

Bloomingdale's By Mail Ltd. ("By Mail") generally agrees with the Motion to Dispose of Case (July 17, 1992) (the "Motion") submitted by Joe B. Huddleston, Commissioner of Revenue, and Charles W. Burson, Attorney General (collectively the "Commissioner"). However, contrary to the Commissioner's suggestion, By Mail believes that it is entitled to recover the entire amount of

attorneys' fees expended in defending against the Commissioner's enforcement of the unconstitutional statute at issue in this case, under 42 U.S.C. § 1988.

The Commissioner admits that By Mail's Commerce Clause rights were violated by the Commissioner's unconstitutional imposition of a duty on the company to register as a dealer in Tennessee and collect use tax on its mail order sales. In light of *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992), he could reach no other reasonable conclusion. Nevertheless, the Commissioner attempts to limit By Mail's recovery of attorneys' fees to 20 percent of its assessment, under T.C.A. § 67-1-1803(d) (1989 & Supp. 1991).

By Mail's attorneys' fees and expenses, however, may not be limited by T.C.A. § 67-1-1803(d). State law, of course, may not limit the amount of fees recoverable under 42 U.S.C. § 1988. *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) ("There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress"); *Spain v. Mountanos*, 690 F.2d 742, 746 (9th Cir. 1982) (state law cannot limit recovery of attorneys' fees under § 1988); *Gates v. Collier*, 616 F.2d 1268, 1272 (5th Cir. 1980) (same); *Gary W. v. Louisiana*, 622 F.2d 804, 806-07 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981) (same); *Green v. Obledo*, 207 Cal. Rptr. 830, 834 (Cal. App. 1984), *cert. denied sub nom. McMahon v. Green*, 474 U.S. 819 (1985) (reading state statute to permit award of attorneys' fees under § 1988 to avoid placing state legislature "at loggerheads with the Congress"); *see also, e.g., Felder v. Casey*, 487 U.S. 131 (1988) (striking down state notice-of-claim statute that undermined 42 U.S.C. § 1983); *Rogers v. Saylor*, 760 P.2d

232, 239 (Or. 1988) ("[a] state cannot limit the amount a plaintiff can recover in a section 1983 action").

The sole question before the Court is whether § 1988 is applicable to cases such as this.[1] In *Dennis v. Higgins*, 111 S. Ct. 865 (1991),[2] and *Howlett v. Rose*, 110 S. Ct. 2430,

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[1] Although By Mail's complaint does not specifically cite 42 U.S.C. § 1983, it made out a clear claim that the Commissioner violated By Mail's constitutional rights under color of state law and therefore alleged every necessary element of a § 1983 claim. Specific citation to § 1983 is not required to maintain a suit under the statute and secure attorneys' fees under 42 U.S.C. § 1988. *E.g., Americans United for Separation of Church & State v. School District of Grand Rapids*, 835 F.2d 627, 628, 631 (6th Cir. 1987) (plaintiffs need not plead and rely specifically on § 1983 in order to be entitled to an award of attorneys' fees under § 1988 in action against state authorities to vindicate constitutional rights, holding that "[t]he rule . . . is that § 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented"); *Packard v. Gordon*, 537 A.2d 140, 144 (Vt. 1987) ("The general rule is that § 1983 need not be explicitly pled in order to obtain attorneys' fees under § 1988"); *Gumbhir v. Kansas State Bd. of Pharmacy*, 646 P.2d 1078, 1084 (Kan. 1982), *cert. denied*, 459 U.S. 1003 (1983) (complaint alleging only the denial of the plaintiff's various constitutional rights adequately pleaded a § 1983 claim, even though "§ 1983 was never mentioned"); *Central Machinery Co. v. State*, 730 P.2d 843, 847 n.3 (Ariz. 1986), *cert. denied*, 481 U.S. 1042 (1987) ("[w]e do not believe that [the plaintiff's] failure to specifically allege a § 1983 cause of action in the original complaint should serve as a procedural barrier to the claim before us"); *Boldt v. State*, 305 N.W.2d 133, 143 (Wis.), *cert. denied*, 454 U.S. 973 (1981) (allegation in complaint of "a violation of the due process clauses of the Wisconsin and United States constitutions" stated a § 1983 claim).

[2] In *Dennis*, the Supreme Court declared it had "given full effect to [§ 1983's] broad language, recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms

2438 (1990), the United States Supreme Court made clear that, as a general matter, states are obligated to entertain suits under § 1983. We acknowledge that this Court held in *L. L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), that a taxpayer against which a tax assessment had not issued could not maintain a suit for injunctive and declaratory relief in state court under § 1983 without going through the procedure dictated by T.C.A. § 67-1-1802 *et seq.* (1989 & Supp. 1991). This is not such a case. Here, By Mail did not attempt to anticipate an assessment by seeking declaratory and injunctive relief. Instead, By Mail's suit was filed pursuant to § 67-1-1801 *et seq.* after By Mail had been assessed by the Commissioner.

Under these circumstances, we think that *L.L. Bean* is inapplicable, and respectfully request that this Court remand to the Chancry Court for a determination of attorneys' fees under § 1988. Alternatively, if the Court wishes to have this issue more fully developed, we request that the Court order further briefing on that issue before this Court.

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of official violation of federally protected rights.' " 111 S. Ct. at 869 (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-01 (1978). The taxpayer in *Dennis* did business as a motor carrier operating in several states. He filed a class action suit in Nebraska state court challenging the constitutionality of certain retaliatory taxes and fees. The taxpayer claimed that the taxes and fees violated his Commerce Clause rights, giving him a cause of action under § 1983. The United States Supreme Court agreed, concluding that "the Supreme Court of Nebraska erred in holding that [the taxpayer's] Commerce Clause claim could not be brought under 42 U.S.C. § 1983." 111 S. Ct. at 873.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY

By: /s/ Joseph W. Gibbs/by PHM
Joseph W. Gibbs (No. 6806)

By: /s/ Patricia Head Moskal
Patricia Head Moskal (No. 11621)
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JONES, DAY, REAVIS & POGUE

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By: /s/ Timothy B. Dyk/by PHM
Timothy B. Dyk
Edward K. Bilich
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Of counsel:

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(513) 579-7337

[Certificate of Service omitted]

APPENDIX G

IN THE SUPREME COURT OF TENNESSEE
MIDDLE GRAND DIVISION
AT NASHVILLE

BLOOMINGDALE'S BY MAIL LTD.,	)	
Plaintiff-Appellant,	)	Davidson Equity No. 01-S-01-9106-CH-00047
v.	)	
JOE HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee,	)	
Defendants-Appellees.	)	

REPLY OF DEFENDANTS-APPELLEES TO RESPONSE OF PLAINTIFF-APPELLANT TO MOTION TO DISPOSE OF CASE

(Filed July 23, 1992)

The Defendants-Appellees, Joe Huddleston, Commissioner of Revenue, and Charles W. Burson, Attorney General, have submitted a Motion to Dispose of Case, conceding that this case is controlled by *Quill Corporation v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904 (1992), that the decision of the trial court below should be vacated, and that judgment should be entered in favor of Plaintiff for certain specified relief, including an award of attorneys' fees and expenses of litigation pursuant to T.C.A. § 67-1-1803(d). Plaintiff has stated its general agreement with the Motion, except it contends that it should receive an award of attorneys' fees pursuant to 42 U.S.C. § 1988, in an amount greater than twenty per cent (20%) of the

assessment, which is the limit placed on such awards under Tennessee tax procedure, as established by T.C.A. § 67-1-1803(d). The defendants submit that this Court's recent decision in *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), clearly establishes that relief in state tax cases is not available under 42 U.S.C. §§ 1983 and 1988, but may be had exclusively pursuant to T.C.A. §§ 67-1-1801 *et seq*. Accordingly, the Motion as framed by Defendants accurately states the relief that should be granted.

Bloomingdale's By Mail did not bring this suit under § 1983 and did not seek relief under § 1988 in its complaint or in any other papers during the course of this suit. Had it done so, those claims would have been dismissed in accordance with the holding in *L.L. Bean*. Instead, this suit was properly maintained solely under T.C.A. § 67-1-1801, which with its companion provisions is the exclusive means for obtaining relief from a tax assessment in Tennessee. T.C.A. § 67-1-1804. These provisions provide for an award of attorneys' fees and expenses up to twenty per cent (20%) of the amount assessed. Defendants have agreed that plaintiff should receive an award of the maximum amount under this statute, which would be twenty per cent (20%) of the assessment of $357,550, for a total of $71,510.

Plaintiff's claim to an even greater award under § 1988 is conclusively rejected by this Court's recent decision in *L.L. Bean*. In that opinion the Court fully analyzed all relevant authority and held that Tennessee courts will not entertain §§ 1983 and 1988 claims in state tax cases, since Tennessee tax procedure provides a full and adequate remedy for such claims through T.C.A.

§ 67-1-1801 et seq. The Court observed that nothing in federal law requires state courts to maintain § 1983 claims in tax cases, so long as the state provides a procedure for litigating constitutional claims that is plain, speedy, and efficient. The plaintiff in *Bean* had sought a determination of its liability for Tennessee taxes under 42 U.S.C. § 1983 and an award of attorneys' fees under 42 U.S.C. § 1988. This Court affirmed the trial court's dismissal of that claim, holding that "the exclusive remedy afforded by T.C.A. § 67-1-1801 *et seq.* is adequate for purposes of determining any liability L.L. Bean may have for Tennessee sales taxes." 817 S.W.2d at 297. The Court "decline[d] to recognize § 1983 jurisdiction in state court over a matter that would not be cognizable in federal court on the basis of § 1983." It reasoned that, "To do otherwise would undermine the exclusive authority provided in T.C.A. § 67-1-1804 for determining liability with respect to taxes collected or administered by the Department of Revenue." *Id.* In its analysis, the Court recognized that the Tax Injunction Act of 1937 denies to federal courts any jurisdiction with respect to § 1983 actions involving state tax matters when there is a plain, adequate, and speedy remedy in the state courts." 817 S.W.2d 294. The Court concluded that "the same principle that denies federal courts jurisdiction with respect to 42 U.S.C. § 1983 actions involving state tax matters should prevent state courts from entertaining such actions when an adequate state remedy is otherwise available." *Id.*

The plaintiff was afforded and utilized the state remedy established at T.C.A. § 67-1-1801 *et seq.* to obtain relief in this case from Tennessee's tax assessment. Because plaintiff clearly had an adequate state remedy, it

could not maintain § 1983 and § 1988 claims, either in federal court or in state court. *See California v. Grace Brethren Church*, 457 U.S. 292, 102 S.Ct. 2498, 73 L.Ed2d 93 (1982) (no federal court action available); *L.L. Bean v. Bracey*, 817 S.W.2d 292 (Tenn. 1991) (no state court action available).

Plaintiff seeks to avoid the holding in *L.L. Bean* by arguing that it did not attempt to anticipate an assessment as Bean did, but instead went through the procedure established by T.C.A. § 67-1-1801 *et seq*. Plaintiff's use of the state remedy, however, does not enable it to piggyback a § 1983 claim onto that remedy, so as to have two remedies. The state remedy is *exclusive*, and the federal Tax Injunction Act requires only that the state provide *one* remedy, not two. Plaintiff's feeble attempt to distinguish *Bean* demonstrates how conclusively that decision disposes of its claim under § 1988.

Plaintiff cites several cases for the proposition that state law may not limit the amount of fees recoverable under § 1988. Those cases are irrelevant here, because they apply only when the state courts must maintain an action under § 1983. In this case, since § 1983 relief is not available in federal court because of the Tax Injunction Act, and is not available in state court because of the exclusivity of state procedures discussed in *L.L. Bean*, the criteria for § 1988 awards are inapplicable, since jurisdiction under § 1983 never attaches.

Nothing in *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865 (1991), or *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990), requires state courts to maintain § 1983 actions in

state tax cases. This Court cited and thoroughly considered both of these decisions in *L.L. Bean* and concluded that such an argument "is defeated by the provision of exclusivity in T.C.A. § 67-1-1804 and by the policy considerations of the Tax Injunction Act of 1937." 817 S.W.2d at 294.

Plaintiff's position would subject the State and its officers to § 1983 and § 1988 liability in all tax cases that include a federal constitutional claim. Since most complaints in tax cases contain a due process, equal protection, commerce clause, or contract clause allegation, the tax procedures carefully tailored by the Legislature would become a virtual nullity. The limitation of attorneys' fees to twenty per cent (20%) of each assessment would then be ineffective, except to limit the State's award when it prevails. In addition to all the other enumerated problems with plaintiff's position, this would destroy the level playing field that the General Assembly intended to establish, upon which taxpayers and the State are to receive attorneys' fees on an equal basis. *See Nutritional Support Services, Ltd. v. Taylor,* 803 S.W.2d 213, 217 (Tenn. 1991). Nothing in federal law remotely indicates that carefully designed and adequate state procedures must yield to §§ 1983 and 1988 as jurisdictional vehicles in state tax cases. Indeed, the Tax Injunction Act, as construed in *Grace Brethren Church,* mandates just the opposite.

Defendants have submitted to the Court a Motion and Proposed Order that afford Bloomingdale's By Mail the full relief to which it is entitled under the *Quill* decision. This includes the maximum award of attorneys' fees and expenses of litigation afforded under Tennessee

law and procedure. Since this Court in the *L.L. Bean* decision has so recently and thoroughly disposed of § 1983 and § 1988 claims similar to those that plaintiff has interjected at this late stage of the case, the concerns of judicial economy and expeditious disposition of the case indicate that the Court should direct an award of attorneys' fees only within the terms of T.C.A. § 67-1-1803(d).

Defendants therefore submit that their Motion to Dispose of Case should be granted and that the judgment and fees to which plaintiff is entitled should be those embodied by that pending Motion.

Respectfully submitted,

CHARLES W. BURSON
Attorney General and Reporter

/s/ John Knox Walkup
JOHN KNOX WALKUP (NO. 7776)
Solicitor General

/s/ Charles L. Lewis
CHARLES L. LEWIS (No. 4693)
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450 James Robertson Parkway
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Counsel for Defendants-Appellees JOE HUDDLESTON, Commissioner of Revenue, and CHARLES W. BURSON, Attorney General of Tennessee

[Certificate of Service Omitted]

APPENDIX H

TENN. CODE ANN.,

Title 67, Part 18 (1989 Repl. Vol.)
(Known as the "Wilder Bill")

Part 18 – Taxpayer Remedies for Disputed Taxes

67-1-1801. Enumeration of remedies. – (a)(1) In all cases in which any officer, charged by law with the authority to assess taxes which are collected or administered by the commissioner of revenue, shall assess a tax alleged or claimed to be due, if the taxpayer against whom the assessment is made believes the assessment to be unjust, illegal or incorrect, his remedies shall be as follows:

(A) He may pay the tax and file a claim for refund thereof and proceed as provided in Acts 1986, ch. 749; or

(B) He may file suit against the commissioner in chancery court in the appropriate county in this state, challenging all or any portion of the assessment of such tax (including any interest and penalty associated therewith). Until the earlier of the expiration of ninety (90) days following the mailing of notice of assessment to the taxpayer, or the filing of a suit by the taxpayer as provided in subsection (b), no levy as defined in § 67-1-1404 shall be made, begun or prosecuted by the commissioner. The commissioner may, however, initiate and pursue any other action to collect an assessed deficiency under part 14 of this chapter or otherwise, including, but not limited to, the filing of a notice of lien as provided in § 67-1-1403 and the collection of a jeopardy assessment.

(2) Provided, that the provisions of subdivision (a)(1)(B) shall not apply to those cases where the assessment is based on:

(A) Bad checks;

(B) Debit memos based on mathematical errors caused by the taxpayer's own figures; and

(C) Delinquent partial payment agreements.

(b) A suit challenging the assessment of a tax or seeking stay of collection of an inheritance or gift tax deficiency pending final determination of a timely proceeding for review of an appraisal filed by the taxpayer before the appropriate board:

(1) Must be filed within ninety (90) days from the date of mailing of the notice of assessment to the taxpayer by the commissioner, with a copy of the notice of assessment attached thereto as an exhibit; and

(2) Must be signed by the taxpayer under the penalties of perjury, affirming that the taxpayer (or affiant) believes that the assessment, or the portion thereof being challenged, is unjust, illegal or incorrect and that the suit is brought in good faith and not solely for the purpose of delay.

(c)(1) A suit filed by a taxpayer under the provisions of subsection (b) shall operate to continue the stay of collection of the tax, or portion thereof challenged, as provided in subdivision (a)(1)(B), except as otherwise

provided in subsection (d), until dismissal or final determination thereof, if the taxpayer also files with his suit one (1) of the following:

(A) A corporate surety bond or an irrevocable letter of credit (in the form prescribed by regulations issued by the commissioner) issued by a qualified surety company or bank, in a principal amount equal to one hundred fifty percent (150%) of the amount of the assessment or portion thereof which is challenged by the suit;

(B) A pledge or collateral assignment of assets in an amount and form satisfactory to the commissioner as evidenced by the commissioner's written consent thereto; or

(C)(i) An affidavit executed by or on behalf of the taxpayer which lists and describes with particularity:

(*a*) All of the taxpayer's assets and the respective fair market values and present location thereof, and all of the liabilities (the amount thereof, and the person's or persons' address to whom such liability is owing), which are an encumbrance or lien against such assets; and

(*b*) All transfers and assignments of the taxpayer's assets (whether such transfer was by gift, as collateral security, or otherwise) within the one-year period preceding the date of the assessment (together with a description of the asset, its value, and the name and address of the transferee or assignee thereof), except those transfers or assignments which were bona fide, arm's length sales or pledges of noninventory assets of a value of less than one thousand dollars ($1,000), or sales from inventory occurring

in the ordinary course of taxpayer's trade or business, or sales in a transaction which complied with the provisions of title 47, chapter 6 (Uniform Commercial Code-Bulk Transfers) of which the commissioner was given requisite notice, and for which the taxpayer received full and adequate consideration in money or money's worth; and

(ii) A certified copy of each notice of lien, in the form prescribed by regulations issued by the commissioner, required to be filed herein. A notice of lien in favor of the commissioner on all of the taxpayer's real property, wherever situated, shall be filed in the office of the secretary of state and in the office of the register of deeds in the county of the taxpayer's domicile or principal place of business in this state. A notice of lien in favor of the commissioner shall also be filed in other states, in the county in which the taxpayer's real estate is situated.

(2) For purposes of this subsection:

(A) In the case of a corporate taxpayer, no distribution to a shareholder thereof by way of a dividend, redemption, liquidation or partial liquidation, nor principal repayment of a debt by the corporate taxpayer to the shareholder shall be deemed as having been made for full and adequate consideration;

(B) A corporate surety company shall be "qualified" to issue a surety bond if it is authorized by the commissioner of commerce and insurance to engage in the surety insurance business in this state, and a bank shall be "qualified" to issue its irrevocable letter of credit if it has been designated by the state treasurer as an authorized depository bank for the deposit of

state funds, unless it has been determined by the commissioner to be not qualified for this purpose, based on reasonable standards uniformly applied;

(C) An asset of a taxpayer may include property assigned to the taxpayer for the limited purpose of having such asset pledged, collaterally assigned, or subjected to the lien in favor of the commissioner;

(D) A notice of lien filed as provided herein constitutes a lien against taxpayer's property (including after acquired property and replacement property) to the extent of the amount of the assessment or portion thereof challenged by the taxpayer's suit, including all penalties and interest associated therewith or imposed by the court, and shall have priority over all subsequent liens filed and perfected against the taxpayer's property, and may be collected and enforced by the commissioner in the same manner as a judicial lien or judgment, or in accordance with the provisions of part 14 of this chapter; and

(E) A notice of lien, whether filed by the commissioner under § 67-1-1403 or filed by the taxpayer under this subsection, against any inventory, stock in trade, or trade receivables of the taxpayer shall not operate to or be construed so as to preclude the sale of such inventory or stock in trade by the taxpayer to customers in the ordinary course of the taxpayer's trade or business, nor to prevent the taxpayer from using the proceeds from the sale of inventory or stock in trade to customers in the ordinary course of the taxpayer's trade or business, and the proceeds from collection of trade receivables for the

ordinary and necessary conduct and continuation of the taxpayer's trade or business.

(3) During the period of running of the ninety-day period for filing suit as provided in subdivision (b)(1), and before suit is filed, the taxpayer shall have the right to an informal conference with the commissioner to discuss the assessment and to present such matters as may be relevant thereto; provided, that written request for such conference is made within thirty (30) days from the date of notice of assessment. If timely request for a conference is made, the commissioner shall set a time and place for the conference within twenty (20) days from the date of the request, and shall give the taxpayer written notice thereof. Within ten (10) days after the conference, the commissioner shall give the taxpayer written notification of his decision. No provision herein, nor action or inaction by the taxpayer or the commissioner, shall be construed to extend or toll the running of the ninety-day period for filing suit, nor shall the taxpayer be prejudiced in any manner by either seeking or failing to seek or pursue an informal conference. The informal conference provided in this subdivision (c)(3) shall not be considered to be an administrative remedy and shall not constitute a contested case subject to the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. The commissioner shall not be prejudiced in any manner by failing to act within the time periods prescribed herein, except that no interest shall accrue on any deficiency during any period in which the commissioner has not acted within the time limits prescribed herein, until the earlier of such time as suit is filed by the taxpayer or the ninety-day period for filing suit has

expired. At any time prior to the filing of suit by the taxpayer, the commissioner, in his discretion, may hold informal conferences with the taxpayer without the requirement of timely written request therefor.

(d) If the taxpayer has filed a qualified corporate surety bond or bank irrevocable letter of credit in the amount equal to one hundred fifty percent (150%) of the amount of the assessment or portion thereof which is challenged by the suit, or has entered into a pledge or collateral assignment of assets in an amount and form satisfactory with the commissioner as evidenced by the commissioner's written consent thereto, or has filed certified copies of notices of liens on all of the taxpayer's property, or on unencumbered property of the taxpayer located in this state equal in value to at least one hundred fifty percent (150%) of the amount of the assessment, or the portion thereof challenged by the suit, proceedings or actions for the collection of the assessed tax (or challenged portion thereof), including action to enforce the lien in favor of the commissioner under the provisions of part 14 of this chapter, shall be stayed pending final determination of the suit; provided, however, that unless the taxpayer has filed a qualified corporate surety bond or bank irrevocable letter of credit, in the amount provided herein, the commissioner shall not be prohibited or stayed from taking action to enforce or collect a jeopardy assessment as provided in §§ 67-1-1406 and 67-1-1431. In the event the suit is withdrawn or dismissed, or final judgment thereon is rendered in favor of the commissioner as to all or any portion of the challenged assessment, the commissioner shall be entitled to collect the amount of the assessment, interest accrued thereon, and

any penalty assessed against the taxpayer, by enforcement of the bond, the letter of credit, the pledge or collateral assignment of assets, or the lien.

(e) In the event the commissioner commences a jeopardy proceeding under § 67-1-1406 and under § 67-1-1431, a taxpayer who has filed suit under this section and has filed a pledge or collateral assignment of assets in an amount and form acceptable and consented to by the commissioner as herein provided, or has filed notices of lien on all of his property or on unencumbered property of the taxpayer located in this state, equal in value to at least one hundred fifty percent (150%) of the assessment or portion thereof challenged by the suit, the taxpayer shall have the right to seek a stay by the court of such jeopardy proceeding. The court shall not have jurisdiction to issue an ex parte stay or temporary restraining order. A stay or temporary order restraining such jeopardy proceeding may be issued by the court only after hearing held upon not less than fifteen (15) nor more than thirty (30) days prior notice to the commissioner. At a hearing for stay or temporary order restraining jeopardy proceedings, the commissioner's basis for such proceeding shall be presumed to be correct and the burden of proof shall be on the taxpayer to establish by clear and convincing evidence that the commissioner does not have a reasonable basis in fact for finding that collection of the tax is in jeopardy.

(f) If the taxpayer files an amendment to his complaint challenging the assessment of additional taxes, for purposes of staying action for collection under subsection (d), such amended complaint shall be treated as an original complaint, and no stay of collection shall apply unless

or until an additional qualified corporate surety bond, bank letter of credit, pledge or collateral assignment of assets consented to by the commissioner is filed, or notices of lien are filed on all taxpayer's property or on additional property of the taxpayer located in the United States to the extent required to equal or exceed one hundred fifty percent (150%) of the amount of additional assessment challenged. The filing of an amendment to a complaint in a pending suit challenging the assessment of additional taxes shall be deemed to be the filing of a suit as provided as subsection (b).

(g) The commissioner may at any time file a motion with the court challenging the qualification, sufficiency, or validity and accuracy of any bond, letter of credit, affidavit, or notice of lien filed by a taxpayer. Such motion may also seek to increase the amount of any bond, letter of credit, pledge or collateral assignment of assets, or notice of lien, which shall be granted, if it reasonably appears to the court that the amount is not sufficient to protect the state adequately. The commissioner shall be entitled to discover any and all matters, not privileged, pursuant to the provisions of the Rules of Civil Procedure. If a bond, letter of credit, or notice of lien is determined, after hearing, to be disqualified or insufficient to stay a levy or action to collect the assessment, or portion thereof challenged, such stay shall be lifted unless made qualified or sufficient within the time, not to exceed ten (10) days, prescribed by the court. If the court, after hearing, determines that an affidavit filed by the taxpayer contains material omissions, misrepresentations, overvaluation of assets or understatement of liabilities, the court shall dismiss the taxpayer's suit with prejudice,

unless the court also finds, from the preponderance of the evidence, that such omission, misrepresentation, overvaluation or understatement was not intentional and was not made for the purpose of misleading the commissioner or the court, or of conceiving or disguising assets, transfer of assets, or the value thereof.

(h) The commissioner shall be entitled, upon motion with notice to the transferee or assignee thereof, to have the court set aside and order restored to the taxpayer for the benefit of the commissioner all transfers and assignments of taxpayer's assets occurring subsequent to or within one (1) year preceding the filing of suit by the taxpayer challenging an assessment by the commissioner, except those transfers or assignments which were bona fide, arm's length sales or pledges of noninventory assets of a value of less than one thousand dollars ($1,000), or sales from inventory occurring in the ordinary course of taxpayer's trade or business, or sales in a transaction which complied with the provisions of title 47, chapter 6 (Uniform Commercial Code-Bulk Transfers) of which the commissioner was given requisite notice and for which the taxpayer received full and adequate consideration in money or money's worth. The commissioner shall be entitled to discover any and all matters, not privileged, pursuant to the provisions of the Rules of Civil Procedure. The court may order the restored assets sold and liquidated under the procedures established in part 14 of this chapter, and shall apply the net proceeds thereof to the payment of all amounts assessed by the commissioner against the taxpayer, and shall return the balance thereof pro rata to the person or

persons from whom the assignment or transfer of such assets was set aside.

(i) To the extent of any amounts collected by or paid to the commissioner with respect to an assessment, or any portion thereof, challenged by suit by the taxpayer, whether such collection was pursuant to a jeopardy proceeding, by application of assets restored to the taxpayer pursuant to subsection (h), or otherwise, the suit shall proceed as a timely suit for refund of taxes paid, as if a timely claim for refund had been filed by the taxpayer and denied by the commissioner.

(j) Upon assessing a tax, the commissioner shall give prompt written notice of the assessment to the taxpayer, together with notice that the taxpayer has the right to file suit in the appropriate chancery court of this state in accordance with the provisions of this section to challenge the assessment and collection of such tax within ninety (90) days from the date of such notice, and the right to have an informal conference with the commissioner upon written request made within thirty (30) days from the date of such notice. [Acts 1986, ch. 749, § 5; 1987, ch. 91, § 1.]

67-1-1802. Refunds. – (a)(1) The commissioner of revenue, with the approval of the attorney general and reporter, except as provided in subdivision (a)(4), is empowered and directed to refund to taxpayers all taxes collected or administered by the commissioner that are, on the date of payment, paid in error or paid against any statute, rule, regulation or clause of the constitution of this state or of the United States. Such refunds shall include, but not be limited to, credit carryovers generated

after an audit review of returns, reports, or other documents filed by the taxpayer, including amendments thereto. Such refunds shall not, however, include credits generated by mechanical processing or mechanical mathematical verification processes. The authority granted in this subdivision shall extend only to taxes for which a claim is filed, with the commissioner under oath and supported by proper proof, within three (3) years from December 31 of the year in which the payment was made. The entire disputed amount of tax, penalty and interest must be paid before any claim for refund thereof can be filed.

(2) The commissioner is authorized to make refunds without a claim being filed if he is in possession of proper proof and facts that a refund is due within three (3) years from December 31 of the year in which the payment was made.

(3) The commissioner is authorized to refund corporate excise taxes due a taxpayer because of a decrease in net income divulged by an examination by the internal revenue service, provided a claim is filed with the commissioner supported by proper proof, within three (3) years from the date of such redetermination of net income by the internal revenue service.

(4) The commissioner is authorized to refund estate taxes due a taxpayer because of a decrease in federal estate tax resulting from an examination by the internal revenue service, provided a claim is filed with the commissioner supported by proper proof, within two (2) years from the date of such redetermination of the estate by the internal revenue service.

(5) The commissioner is authorized to refund, without the necessity of a claim having been filed, inheritance taxes due a taxpayer because of a decrease in inheritance tax resulting from an examination by the commissioner.

(6)(A) The commissioner is authorized and empowered, in his discretion, to designate subordinate officials in the department to approve, on his behalf, claims for refunds in amounts of one thousand dollars ($1,000) or less. Only one (1) such subordinate official and one (1) alternate subordinate official shall be designated to approve any one (1) class of claims. The commissioner shall notify, in writing, the commissioner of finance and administration and the attorney general and reporter as to the names of any such subordinate officials so designated.

(B) The commissioner is also authorized and empowered, in his discretion, to approve claims for refunds in amounts of more than one thousand dollars ($1,000) but not more than fifteen thousand dollars ($15,000). Any such claim for refund shall be reviewed initially by the director of the tax division responsible for collecting the tax. The director shall make a finding in regard to each claim recommending either approval or disapproval. This finding shall be reviewed by the legal office of the department of revenue, which shall make its own recommendation approving or disapproving the claim. Both these findings shall be submitted to the commissioner, who shall make a final determination either approving or disapproving the claim in his discretion based on all information available to him. The findings of the division director and legal office shall be advisory only and shall not be construed to limit the discretion

of the commissioner in making refunds under this subsection. The commissioner is authorized and empowered to designate either the deputy commissioner or an assistant commissioner to approve on his behalf claims for refund under this subdivision (a)(6)(B).

(C) The commissioner is also authorized and empowered to approve claims for refunds in amounts of more than fifteen thousand dollars ($15,000); provided, that the attorney general may require that the refund of such claims or any class of such claims be subject to his prior review and approval.

(7) A refund which is authorized solely by a final court adjudication shall not be made to any person who is not either a party to such action or a party to another similar action.

(8) In any case in which the statute of limitations on the assessment of tax is extended by agreement in writing pursuant to § 67-1-1501(b)(5), the periods specified in this subsection which limit the ability of the commissioner to refund taxes may also be extended for an equivalent period of time by agreement in writing entered into by the commissioner or his delegate and the taxpayer.

(b)(1) All claims for refund filed pursuant to this section shall be finally determined within six (6) months following receipt of the claim. If the claim for refund is denied, the commissioner shall promptly notify the claimant of the denial, and of the claimant's right to file a suit for refund in the appropriate chancery court in this state within six (6) months from the date of denial.

(2) If a claim is not determined within the six-month period following receipt by the commissioner of such claim, the claim shall be deemed to be denied for the purpose of filing suit in chancery court.

(c)(1) Upon denial by the commissioner of a claim for refund, or upon the expiration of the six-month period following receipt by the commissioner of the claim, whichever occurs first, the taxpayer may file suit against the commissioner within six (6) months in the appropriate chancery court of this state for a refund. The chancery court shall conduct a de novo trial of the suit.

(2) The commissioner, by written notice promptly delivered to the taxpayer, may waive the requirement that the taxpayer file a claim for refund, in which case the taxpayer may file suit in the appropriate chancery court of this state for a refund within six (6) months following the date of such waiver by the commissioner, and such suit shall proceed in all respects (including for the purpose of determining the date from which interest thereon should be calculated) as if proper and timely claim for refund had been filed by the taxpayer and either denied or not acted upon by the commissioner with the period specified herein. [Acts 1986, ch. 749, § 6; 1988, ch. 526, §§ 2, 3; 1989, ch. 127, § 1; 1989, ch. 236, § 6.]

67-1-1803. Jurisdiction – Certification of refunds – Attorneys' fees – Statute of limitation tolled – Appeals – Expedited proceedings. – (a) The subject matter jurisdiction shall be and the venue of suits filed pursuant to Acts 1986, ch. 749, shall lie in chancery court in either Davidson County or in the county of the taxpayer's domicile or in which the taxpayer has his principal place of business.

(b) If it is determined that the taxes for which a claim for refund was made pursuant to § 67-1-1802, or as to which suit proceeded as a timely suit for refund pursuant to § 67-1-1801(i), were not due from the taxpayer to the commissioner of revenue, for any reason going to the merits of the same, then the court shall certify of record that the same was wrongfully paid and ought to be refunded, together with interest thereon calculated forty-five (45) days from the date of filing a claim for refund or date of waiver by the commissioner pursuant to § 67-1-1802(c)(2), (or on the date of payment in the case of any tax collected after suit was filed under § 67-1-1801) in accordance with § 67-1-1801(d). Thereupon, the commissioner of finance and administration shall issue his warrant for the same, which shall be paid in preference to all other claims on the treasury.

(c) For the purpose of suits brought under Acts 1986, ch. 749, the commissioner of revenue shall be considered a resident of each of the several counties of the state.

(d) The court shall award to the prevailing party attorney's fees and expenses of litigation up to twenty percent (20%) of the amount assessed or denied, including interest after payment.

(e) The filing of the suit by the taxpayer tolls all statutes of limitation as to other persons potentially liable to the taxpayer due to the occurrence from which the claim before the court arises until the final determination thereof.

(f) Appeals of any decision of the chancery court of suits brought pursuant to Acts 1986, ch. 749, shall go directly to the Tennessee supreme court.

(g) Hearings and determination of all proceedings brought under Acts 1986, ch. 749, shall be expedited to the extent feasible and proper. [Acts 1986, ch. 749, § 7.]

67-1-1804. Exclusivity of procedures. – The procedure established by Acts 1986, ch. 749 is the sole and exclusive jurisdiction for determining liability for all taxes collected or administered by the commissioner of revenue, except that the state board of equalization shall have jurisdiction concurrent with the chancery court in inheritance tax cases in which only issues of valuation are raised, as provided by § 67-8-411, and the board designated in § 67-8-116 shall have jurisdiction concurrent with the chancery court in gift tax cases in which only issues of valuation are raised, as provided by § 67-8-116. [Acts 1986, ch. 749, § 8.]

67-1-1805. Transfer of pending actions to chancery court. – Any claim for refund of taxes collected or administered by the commissioner of revenue pending before the claims commission on April 15, 1986, shall be removed to the appropriate chancery court on notice of removal filed by the petitioner therein with the clerk of the claims commission and the clerk and master of the chancery court, within ninety (90) days from April 15, 1986, with a copy mailed or delivered to the attorney general and reporter. At the time of filing his notice of removal with the clerk and master, the petitioner shall also pay any litigation tax due upon filing an original complaint and post such security for costs or make other

provision for costs as are required to be made upon the filing of an original complaint. If the removed claim is consolidated with a suit then pending in the chancery court by the same taxpayer involving the same subject matter, the court shall order that the second litigation tax be refunded. Upon receipt of a timely notice of removal of a pending tax claim, the clerk of the claims commission shall promptly certify and deliver the record therein to the clerk and master of the chancery court to which it was removed. Upon removal to the chancery court, the matter shall proceed therein on the record as certified and the parties shall file such additional or supplemental pleadings as the court shall direct. The claims commission shall take no further action with respect to matters involving taxes collected or administered by the commissioner of revenue pending before it on April 15, 1986. Claims for refund of taxes collected or administered by the commissioner which are pending before the claims commission on April 15, 1986 shall be dismissed with prejudice if not removed by the petitioner as provided herein. Within thirty (30) days after April 15, 1986, the clerk of the claims commission shall notify all petitioners who have such tax claims then pending before the claims commission that their claim will be dismissed with prejudice if not removed as provided herein. [Acts 1986, ch. 749, § 9.]

67-1-1806. Rules and regulations. – The commissioner of revenue is authorized to promulgate rules and regulations and to prescribe forms to implement the provisions of Acts 1986, ch. 749. [Acts 1986, ch. 749, § 10.]

67-1-1807. Applicable laws – Conditions precedent for recovery – Conflicting laws. – (a) All taxes paid prior

to January 1, 1986, shall be governed by the laws regarding refunds and suits for the recovery of taxes as those laws existed in 1985; provided, that suits brought before April 15, 1986, must have been brought in the claims commission and properly transferred to chancery court pursuant to § 67-1-1805, and suits brought after April 15, 1986, must have been brought in the chancery court within six (6) months of the date of payment under protest.

(b) All taxes paid on or after January 1, 1986, shall be governed by the laws regarding refunds and suits for the recovery of taxes as set out in this part, except as provided in subsection (c).

(c) All taxes paid on or after January 1, 1986, but prior to April 15, 1986, and for which suit for the recovery thereof was filed prior to April 15, 1986, shall be governed by the laws regarding suits for the recovery of taxes as those laws existed in 1985; provided, that such suits must have been brought before the claims commission and properly transferred to chancery court pursuant to § 67-1-1805.

(d)(1) Provided that it shall not be a condition precedent for suit for recovery of taxes paid on or after January 1, 1986, that the same be paid under protest, involuntarily, or under duress.

(2) No suit for the recovery of any tax paid prior to January 1, 1986, shall be allowed unless such tax was paid under protest.

(e) To the extent that the provisions of this section conflict with any other provision of law, the provisions of

this section shall control and supersede all such laws. [Acts 1986, ch. 749, § 11; 1987, ch. 92, § 1.]

APPENDIX I

TENN. CODE ANN. § 67-6-102(4)(J) (1983 Repl.):

> "Dealer" means every person, as used in this chapter, who . . . [d]istributes catalogues or other advertising matter and by reason thereof receives and accepts orders from residents of this state. . . .

TENN. CODE ANN. § 67-6-102(6)(J) (1989 Repl.):

> "Dealer" means every person, as used in this chapter, who . . . [e]ngages in the regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system. . . .

APPENDIX J

Filed May 11, 1993

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through its Tax Commissioner, Robert E. Hanson,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Civil No. 920283

On Petition for Rehearing.

REQUEST FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988 DENIED.

Opinion of the Court by Meschke, Justice.

Donnita A. Wald (argued), and Christianne Y. Runge (appearance), Assistant Attorneys General, Tax Department, 600 East Boulevard Ave., Bismarck, ND 58505-0550, and M.K. Heidi Heitkamp (no appearance), Attorney General, Attorney General's Office, 600 East Boulevard Ave., Bismarck, ND 58505-0040, for plaintiff, appellant and cross-appellee.

Richard A. Hanson (argued), and Don S. Harnack (appearance), McDermott, Will & Emery, 227 West Monroe Street, Chicago, IL 60606, and William P. Pearce

(appearance), of Pearce & Durick, P.O. Box 400, Bismarck, ND 58502-0400, for defendant, appellee and cross-appellant.

State v. Quill Corporation
Civil No. 920283

MESCHKE, Justice.

Quill Corporation has filed a petition for rehearing of our decision after remand from the United States Supreme Court. Quill asserts that it is a prevailing plaintiff in its 42 U.S.C. § 1983 action and is entitled to an award of attorney's fees under 42 U.S.C. § 1988. We hold that a § 1983 action seeking to enjoin the collection of state taxes is not cognizable in state court, and accordingly Quill is not entitled to recover its attorney's fees under § 1988.

The factual and procedural history of this litigation is outlined in our original opinion in this case. *See State v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991), *reversed by Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904 (1992). The State sought a declaratory judgment under NDCC Ch. 32-23 that Quill was required to collect and remit the applicable use tax on its sales of office equipment and supplies to customers in North Dakota. Quill answered that the use tax provisions, NDCC Ch. 57-40.2, violated Quill's rights under the Due Process Clause and Commerce Clause of the United States Constitution. Quill also counterclaimed for § 1983 relief for violation of its Due Process and Commerce Clause rights, and requested attorney's fees under § 1988.

The trial court held that NDCC 57-40.2-01(6) and (7) was unconstitutional as applied to Quill and that Quill could not be forced to collect and remit the use tax. The court dismissed Quill's counterclaim.

The State appealed to this court and Quill cross-appealed. We reversed, holding that imposition of the duty to collect and remit the use tax did not violate Quill's Due Process or Commerce Clause rights. *State v. Quill Corp.* The United States Supreme Court granted certiorari and reversed. *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904 (1992). The Court agreed that Due Process did not bar imposition of the duty to collect the tax in this case, but held that the Commerce Clause prohibited imposition of the duty upon Quill.

Upon remand, we vacated the part of our opinion that had been reversed by the United States Supreme Court and affirmed the judgment of the trial court. *State v. Quill Corp.*, 487 N.W.2d 598 (N.D. 1992). Quill petitioned for rehearing, asserting that it was entitled to prevail on its § 1983 counterclaim and was entitled to attorney's fees under § 1988. We ordered supplementary briefing and granted a rehearing.

The State argued that this case is controlled by *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), in which we held that taxpayers could not bring a § 1983 action in state court to enjoin the assessment of state taxes if there was an adequate remedy available under state law. Quill argues that the rationale underlying *Linderkamp* has been rejected by the United States Supreme Court in *Howlett v. Rose*, 496 U.S. 356 (1990).

In *Linderkamp*, taxpayers sought to enjoin the levy of certain taxes by a school district. They sought relief under the Declaratory Judgment Act, asserted a § 1983 claim, and requested attorney's fees under § 1988. The district court granted summary judgment under the Declaratory Judgment Act and enjoined certain practices by the school district, but dismissed the § 1983 claim and refused to award attorney's fees.

On appeal, we considered the application of the Tax Injunction Act, 28 U.S.C. § 1341, that directs:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

We reasoned that § 1341 would have prohibited the taxpayers from litigating their § 1983 claim in federal court. Although we recognized that § 1341 directly applied only to federal district courts, we considered the policies underlying the Tax Injunction Act and the rationale employed by other state courts in similar cases. We concluded that § 1983 actions could not be brought in state court to enjoin the assessment, levy, or collection of state taxes:

> Thus, although we conclude that the Tax Injunction Act does not *per se* apply to state court actions, we nevertheless conclude that imposition of similar limitations under *state* law upon § 1983 actions brought in state court challenging the levy of state taxes is appropriate. We therefore hold that a taxpayer may not bring a § 1983 action in state court seeking to enjoin, suspend, or restrain the assessment, levy, or collection of

> any tax under state law where an adequate state remedy is available.

Linderkamp, 397 N.W.2d at 80 (footnote omitted). Because the taxpayers in *Linderkamp* had an adequate remedy under state law, we concluded that their § 1983 action was not cognizable in state court and, accordingly, that they were not entitled to attorney's fees under § 1988.

Quill concedes that the Declaratory Judgment Act provides a plain, speedy, and efficient remedy under state law, and that a § 1983 action in federal court would be barred by the Tax Injunction Act. Quill also apparently concedes that, if it is still good law, *Linderkamp* would bar its § 1983 action in state court. Quill's argument therefore rests entirely upon the premise that *Linderkamp* has been abrogated by *Howlett v. Rose*.

In *Howlett*, a former high school student began a § 1983 action in a Florida state court against a school board and three school officials, asserting that a search of his vehicle while it was parked on school premises violated his federal constitutional rights. The school board asserted that it was immune from suit under Florida's sovereign immunity law. The trial court dismissed the federal claims. The Florida District Court of Appeal held that Florida's statutory waiver of sovereign immunity did not apply to § 1983 cases, and affirmed dismissal of the federal claims. The Supreme Court of Florida denied review, and the United States Supreme Court granted certiorari.

The Supreme Court expressed the question presented in *Howlett* this way:

> The question in this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

Howlett, 496 U.S. at 358-359. The Court, after reviewing Florida statutes and case law, concluded that the school board could not rely upon the sovereign immunity defense, when such a defense would be unavailable if the action had been brought in federal court. The Court therefore reversed the judgment of the Florida District Court of Appeal.

Quill argues that *Howlett* stands for the proposition that a state court may not refuse to entertain a § 1983 action upon state law principles, even if the action could not have been brought in federal court. Quill misreads *Howlett*. In its brief, Quill argues:

> The parallels between the Florida court decision in *Howlett* and this Court's decision in *Linderkamp* are striking. In *Howlett*, plaintiff brought a state court action against a school board and several school officials which could not have been brought in federal court because of the Eleventh Amendment. Here, Quill counterclaimed for declaratory relief, a claim which could not be brought in federal court because of 28 U.S.C. § 1341.

However, the *Howlett* problem arose specifically because the school board and school officials were *not* protected by Eleventh Amendment immunity, and *would* have been subject to suit in federal court. That is not the case for Quill.

The Florida District Court of Appeal opinion in *Howlett* was premised upon the Florida Supreme Court's decision in *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988), in which the court applied the state sovereign immunity defense to preclude a § 1983 action in state court against a state agency. Addressing the Florida District Court of Appeal's reliance upon *Hill*, the Supreme Court stated:

> On its facts, the disposition of the *Hill* case would appear to be unexceptional. The defendant in *Hill* was a state agency protected from suit in a federal court by the Eleventh Amendment. See *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (§ 1983 does not "override the traditional sovereign immunity of the States"). As we held last Term in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.
>
> The language and reasoning of the State Supreme Court, if not its precise holding, however, went further. That further step was completed by the District Court of Appeal in this case. As that court construed the law, Florida has extended absolute immunity from suit not

> only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court. That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.

Howlett, 496 U.S. at 365-366 (footnotes omitted).[1] *Howlett* thus makes clear that a state is still not subject to suit under § 1983 in either federal court or state court.

Quill also urges that a passage from *Howlett* supports its assertion that *Linderkamp* is no longer good law:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy

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[1] In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989), the Supreme Court clarified that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " The parties have not raised this issue, and we express no opinion whether an action against "[t]he State of North Dakota, by and through its Tax Commissioner," is properly designated as an action for injunctive relief against a state official in her official capacity. Because we conclude that Quill's § 1983 action is not cognizable in state court under *Linderkamp*, we find it unnecessary to address this issue. *See Blatchford v. Native Village of Noatak*, ___ U.S. ___, ___, 111 S.Ct. 2578, 2584 (1991) (Tax Injunction Act bars official-capacity suits to enjoin state taxation in federal court).

> Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, 496 U.S. at 367. We do not read this quotation as inconsistent with our holding in *Linderkamp*. Although the Court stresses that federal law is to be given force and effect in state courts, *see Kristensen v. Strinden*, 343 N.W.2d 67, 69-71 (N.D. 1983), we do not believe the Court intended to suggest that the remedy under § 1983 has lost its federal character. The Court has repeatedly stated that § 1983 is "a uniquely federal remedy." *See, e.g., Hardin v. Straub*, 490 U.S. 536, 539 n.5 (1989); *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Wilson v. Garcia*, 471 U.S. 261, 271-272 (1985). The Court is merely saying that federal law is binding on the states, and that state courts do not have discretion to refuse to hear federal causes of action.

When the above quote from *Howlett* is read within the context of the entire opinion, it becomes apparent that the point the Court is making is that the Supremacy Clause precludes state courts from applying state procedural rules that would necessarily produce a different result than if the case had been brought in federal court. As the Court later explains:

> The elements of, and the defenses to, a federal cause of action are defined by federal law. . . . A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability . . . . Since this Court has construed the word "person" in § 1983 to exclude States, neither a federal court nor a state court may entertain a

> § 1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and similar governmental entities are "persons," . . . a state court entertaining a § 1983 action must adhere to that interpretation.

Howlett, 496 U.S. at 375-376 (citations omitted). This makes clear that, still, neither a federal court nor a state court may entertain a § 1983 action against the state itself.

Rather, the Court's ruling in *Howlett* simply reiterates the preference for intrastate uniformity expressed in *Felder v. Casey* and *Wilson v. Garcia*. *Felder* is illustrative. In *Felder*, the Court held that a plaintiff was not required to comply with Wisconsin's notice-of-claim statute as a prerequisite to bringing his § 1983 action in state court. The Court noted that application of the statute would often be outcome-determinative, creating a different result depending upon whether suit is brought in state or federal court. *Felder*, 487 U.S. at 131. The Court stressed that it was the intent of Congress that § 1983 would be applied uniformly within each state:

> Finally, in *Wilson*, we characterized § 1983 suits as claims for personal injuries because such an approach ensured that the same limitations period would govern all § 1983 actions brought in any given State, and thus comported with Congress' desire that the federal civil rights laws be given a uniform application within each State. . . . A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.

Felder, 487 U.S. at 152-153 (citation omitted). The federal interest in intrastate uniformity does not require recognition of a § 1983 claim in a state court when it would not be recognized in a federal court.

The result in *Linderkamp* is entirely consistent with the Congressional desire for uniform intrastate application. Unlike the Wisconsin notice-of-claim statute, which precluded certain plaintiffs from bringing in state court a § 1983 action that could have been brought in federal court, *Linderkamp* preserves uniformity of results in § 1983 actions, whether brought in state or federal court within North Dakota. Under the rationale of *Howlett*, *Felder*, and *Wilson*, application of a state rule that fosters intrastate uniformity of results is consistent with Congressional intent and does not violate the Supremacy Clause.

We also remark that the result urged by Quill would reopen the "anomaly . . . that a State might be forced to entertain in its own courts suits from which it was immune in federal court," which the *Howlett* Court concluded had been "fully met" by *Will*. *Howlett*, 496 U.S. at 365. We find nothing in *Howlett* to indicate that the Court intended to require state courts to entertain § 1983 actions to enjoin assessment, levy, or collection of state taxes, when those actions could not be brought in federal court.

Several courts have held that *Howlett* does not require state courts to entertain § 1983 actions that would be barred in federal court by the Tax Injunction Act. In *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), a mail-order company sought declaratory and injunctive relief under § 1983. The court concluded that "the United

States Supreme Court did not hold in *Howlett v. Rose* that a state court must adjudicate a claim made under § 1983 that a federal court would not be required (or permitted) to entertain." *L.L. Bean*, 817 S.W.2d at 296. The court followed *Linderkamp* and other similar cases to conclude that its state courts were not required to entertain § 1983 actions that were barred in federal court by the Tax Injunction Act.[2]

In *Greenwich Township v. Murtagh*, 144 Pa.Commw. 624, 601 A.2d 1352, *appeal granted*, 530 Pa. 635, 606 A.2d 904 (1992), taxpayers brought a § 1983 action in state court challenging assessment of real property taxes. The court joined the "consensus of other state courts" holding that a § 1983 action will not be entertained in state courts to challenge state tax administration if an adequate state remedy is available. *Greenwich Township*, 601 A.2d at 1356. The court noted that the Supreme Court's decision in *Howlett* was premised upon an attempt "to assure that the

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[2] In *Bloomingdale's By Mail Ltd. v. Huddleston*, ___ S.W.2d ___ (Tenn. 1992), the Supreme Court of Tennessee recently reaffirmed its holding in *L.L. Bean*, stating that "*Howlett v. Rose* is not inconsistent with the Tennessee Supreme Court's decision in *L.L. Bean, Inc. v. Bracey*." *Bloomingdale's*, ___ S.W.2d at ___. The court's per curiam opinion then distinguishes *L.L. Bean* on the ground that, unlike the taxpayer in *L.L. Bean*, the taxpayer in *Bloomingdale's* had actually received an assessment. The court then inexplicably concluded that the taxpayer was entitled to § 1983 relief, including attorney's fees under § 1988, even though the taxpayer had never requested relief under §§ 1983 and 1988. To the extent that *Bloomingdale's* reaffirms *L.L. Bean* and indicates that a § 1983 action is improper when no assessment of taxes has yet been made, it supports our decision in this case.

outcome of federal causes of action would be the same, regardless if decided in a state or federal forum." *Greenwich Township*, 601 A.2d at 1355. Similarly, in *Hufford v. Rodgers*, 912 F.2d 1338, 1341 n.1 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1312, 113 L.Ed.2d 246 (1991), the court noted that in *Howlett* the Supreme Court had "clarified that, even in state court, local entities remain subject to suit from federal claims to the same extent as they would be in federal court."

We agree with the result and rationale of these cases. We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions challenging state tax administration when such actions would be barred in federal court. *Howlett*, *Felder*, and *Wilson* recognize that Congress intended that § 1983 be given a uniform application within each state. Accordingly, we read those cases as holding only that state rules that are outcome-determinative, in a manner inconsistent with federal law, will be violative of the Supremacy Clause. Application of the *Linderkamp* holding in this case to preclude a § 1983 action in state court that would be barred in federal court by the Tax Injunction Act is consistent with *Howlett*, *Felder*, and *Wilson*, and creates a uniform result in state and federal court.

One additional factor supports the conclusion we reach. Although the *Linderkamp* rule was created by a state court, it was based exclusively upon federal law and policy. As we noted in *Linderkamp*, 397 N.W.2d at 79-80:

> In determining whether to impose similar restrictions on § 1983 actions brought in state court, we note the policy underpinnings of the

Tax Injunction Act. Although federalism concerns are an important part of the Tax Injunction Act's legislative history, additional factors underl[ie] the statute's enactment, including a general recognition that state taxation embraces uniquely sensitive local concerns and that the greatest possible deference will be paid to state remedial schemes. As noted by Justice Brennan in his opinion concurring in part and dissenting in part in *Perez v. Ledesma*, 401 U.S. 82, 127, 91 S.Ct. 674, 698, 27 L.Ed.2d 701, 730, n. 17 (1971):

> "The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law."

See also Geo. F. Alger Co. v. Peck, 74 S.Ct. 605, 607, 98 L.Ed. 1148, 1150 (1954) (Reed, J., in-chambers opinion) ("The Congress by § 1341 left the burden on the taxpayers to follow the required state procedure rather than to determine the federal issues primarily in the federal courts").

Recognition that the proscriptions of the Tax Injunction Act are based at least in part upon

deference to state remedial schemes leads to the conclusion that a state court § 1983 action, which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court. This concept has been recognized, albeit in a somewhat different context, by the United States Court of Appeals for the Seventh Circuit in *LaSalle National Bank v. Roswell*, 604 F.2d 530, 538-539 (7th Cir. 1979), *rev'd on other grounds*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981):

> "Defendants' position leads to the scenario of a state court adjudicating a cause of action and formulating a remedy – and throughout required to apply federal law. It would be difficult to say that this is less of an incursion into state autonomy than an action in federal court."

We also note the Supreme Court's observation in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 116 (1981), that taxpayers may not challenge the validity of state tax systems through a § 1983 action in federal court, but "must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete." The Wisconsin Supreme Court succinctly analyzed *McNary* in *Hogan v. Musolf*, 163 Wis.2d 1, 471 N.W.2d 216, 222 (1991):

> The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as

> indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend the usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

We agree.

Finally, Quill suggested at oral argument that the Supreme Court's decision in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865 (1991), supports its assertion that a state court may be required to entertain a § 1983 action challenging state taxation. In *Dennis*, motor carriers challenged Nebraska's imposition of retaliatory taxes and fees on out-of-state carriers. They sued in state court seeking declaratory and injunctive relief, asserted a § 1983 claim, and sought attorney's fees under § 1988. The trial court found that the taxes and fees violated the Commerce Clause, granted injunctive relief, and awarded attorney's fees under the "common fund" doctrine. The court dismissed the § 1983 claim. On appeal, the Supreme Court of Nebraska held that the Commerce Clause did not establish individual rights and could not provide the basis for a § 1983 claim. *Dennis v. State*, 451 N.W.2d 676

(Neb. 1990). The court also reversed the award of attorney's fees under the "common fund" doctrine. The United States Supreme Court reversed, resolving a division of authority on the issue, holding that the Commerce Clause confers "rights" within the meaning of § 1983. *Dennis*, 498 U.S. at ___, 111 S.Ct. at 870.

Quill asserts that *Dennis* "makes no sense" unless the Supreme Court viewed state courts as having authority to decide § 1983 tax challenges. However, the only issue addressed by the Supreme Court was "whether suits for violations of the Commerce Clause may be brought under . . . § 1983." *Dennis*, 498 U.S. at ___, 111 S.Ct. at 867. As noted in *Greenwich Township*, 601 A.2d at 1356-1357 n.11, "the majority in *Dennis* never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, apparently because those issues were not raised and because of the unique procedural history of that case."[3]

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[3] Although the majority did not mention the numerous unresolved questions about state court jurisdiction of § 1983 tax challenges, Justice Kennedy's dissent did:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers. The Tax injunction Act, 28 U.S.C. § 1341, prevents any attempt in federal court to "enjoin, suspend or restrain" assessment or collection of a state tax, so long as "a plain, speedy and efficient remedy may be had in the courts of such State." The principle of comity likewise prevents a federal court from entertaining any action for damages under § 1983 to redress allegedly unconstitutional state taxation. . . . Relying upon the "overriding interests of the state in an efficient, expeditious and nondisruptive resolution of . . . tax disputes," . . . state courts

We read no "implied holding" into the Supreme Court's opinion in *Dennis*. Under *Howlett* and other contemporary Supreme Court cases, state courts clearly have concurrent jurisdiction over § 1983 claims. The Tax Injunction Act does not, on its face, restrict state court jurisdiction. A question arises about state court jurisdiction over a § 1983 tax challenge only when the state adopts a rule of law limiting jurisdiction to correspond to federal court jurisdiction. The Supreme Court of Nebraska never reached that question, because it concluded that the Commerce Clause did not confer individual rights. Because the Supreme Court was not presented with any question about a state limitation upon jurisdiction of a § 1983 tax challenge, the Court's opinion in *Dennis* should not be read to "impliedly hold" that such limitations violate the Supremacy Clause.

We hold that Quill's § 1983 claim was properly dismissed in accordance with our holding in *Linderkamp*. Accordingly, Quill is not entitled to recover its attorney's fees under § 1988.

/s/ Herbert L. Meschke

/s/ Beryl J. Levine

> have refused to permit plaintiffs to proceed under § 1983 where there exists a complete remedy under state law. . . . These questions now become of paramount importance, as we risk destruction of state fiscal integrity in a manner which may require congressional correction.

Dennis, 498 U.S. at ___, 111 S.Ct. at 880 (Kennedy, J., dissenting) (citations omitted).

Ralph J. Erickstad, S.J. /s/ Ralph J. Erickstad, S.J.

Gerald W. VandeWalle, C.J.
/s/ Gerald W. Vande Walle, C.J.

Surrogate Judge Ralph J. Erickstad was Chief Justice at the time this case was heard and served as surrogate judge for this case pursuant to NDCC 27-17-03.

Justice J. Philip Johnson, who was a member of the Court when this case was heard, did not participate in this decision.

Justice Neumann and Justice Sandstrom, not being members of the Court when this case was heard, did not participate in this decision.